(21,941.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 177.

GEORGE R. PLUMMER, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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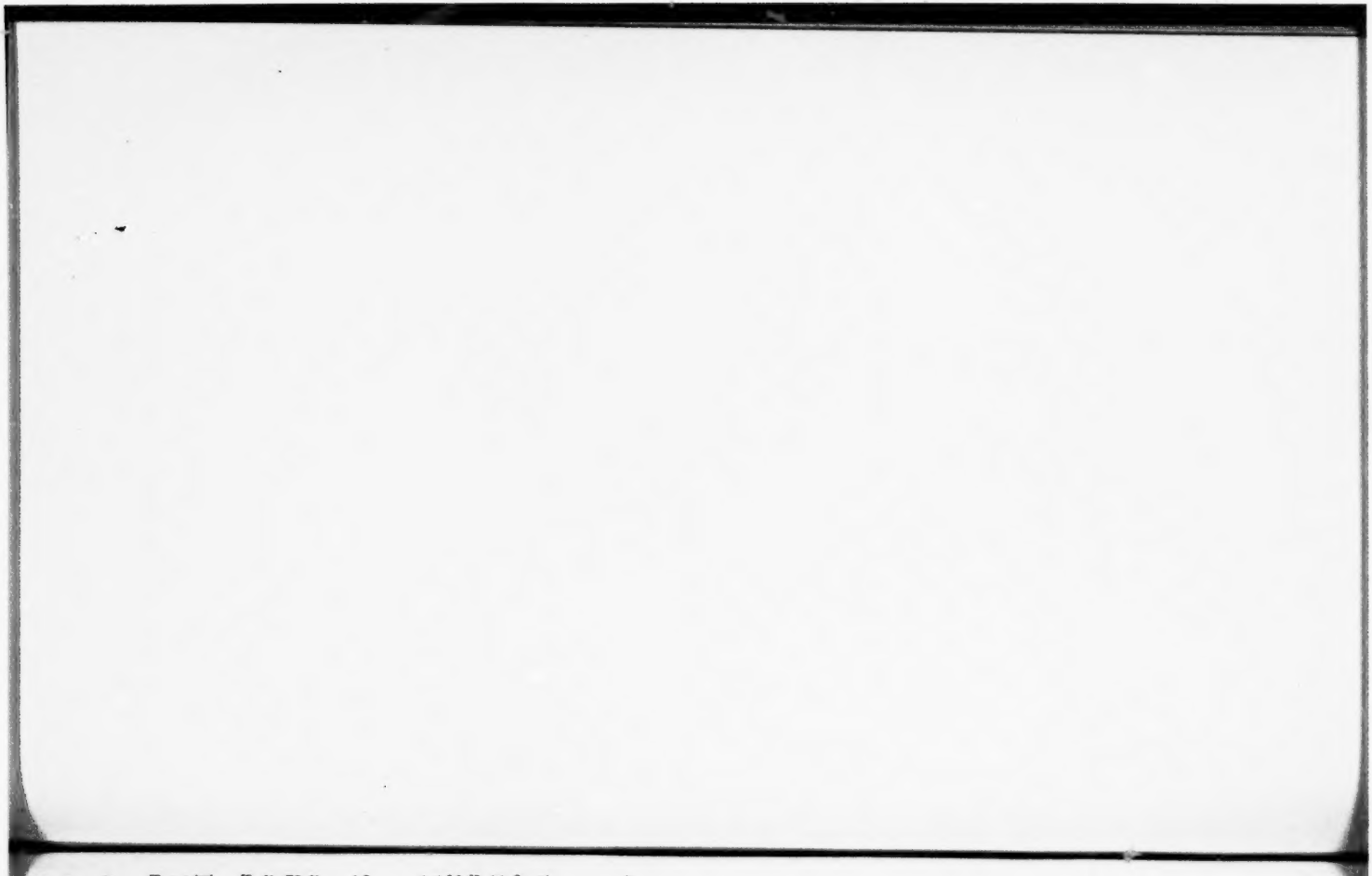

1 In the Court of Claims.

No. 30462.

GEORGE R. PLUMMER
v.
THE UNITED STATES.

I. *Note of Filing of Petition.*

On the 30th day of June, 1909, the claimant filed his original petition. On the 8th day of December, 1909, by leave of the Court, he filed an amended petition as follows:

II. *Amended Petition Filed December* 8, 1909.

"In the Court of Claims.

No. 30462.

"GEORGE R. PLUMMER
v.
THE UNITED STATES.

"Amended Petition.

"To the Honorable the Court of Claims:

"The Claimant, George R. Plummer, respectfully represents:

"I. The claimant was appointed an acting assistant surgeon with the rank of lieutenant, junior grade, in the United States Navy on July 1, 1903, for three years, and at the expiration of that term was reappointed for another term of three years on July 1, 1906, and served as such for that period of service, which he completed on the 30th of June, 1909, in accordance with the provisions of the act of May 4, 1898, 30 Stat. L. 380, which is in the following words:

" 'The President is hereby authorized to appoint for temporary service twenty-five acting assistant surgeons, who shall have
2 the relative rank and compensation of assistant surgeons.'

"II. This appointment was applied for by the claimant, and made by the President in pursuance of a circular issued by the Surgeon-General of the Navy, stating that officers appointed as acting assistant surgeons should receive the pay and allowances of assistant surgeons in the regular navy.

III. The claimant has only received pay for the entire period of his service as above stated at the old rate of pay fixed by Section 1556 of the Revised Statutes of the United States for an assistant surgeon in the navy.

"IV. For the period prior to May 13, 1908, he claims the pay of an army officer of like rank, that is to say, the pay of a first lieu-

tenant, mounted. For the period subsequent to May 13, 1908, he claims pay at the rate fixed by the act of that date, 35 Stat. L. 127, for an officer of the rank of lieutenant, junior grade. He also claims proper longevity increase on account of actual service in the navy as aforesaid, as well as for service rendered by him in the army for which he is entitled to credit under the law, and on five years of constructive service on account of entry into the navy from civil life, in accordance with section 13 of the Navy Personnel Act hereinafter referred to.

"At all times since May 13, 1908, and until the termination of his service he has been entitled on account of actual and constructive service to receive the pay fixed by the law approved May 13, 1908, 35 Stat. L. 127, as the grade pay of a lieutenant, junior grade, to wit, two thousand dollars ($2,000) a year; together with two increases of ten per centum (10%) thereon for more than ten (10) years' actual and constructive service, which by the terms of said act should be 'ten per centum of the current yearly pay for each term of five years' service in the Army, Navy, or Marine Corps,' being for over ten years' service at the total rate for base pay and increases of two thousand four hundred and twenty dollars ($2,420) a year.

3 During the entire service of claimant he has been on duty at the Naval Station, Key West, Florida.

"V. He also claims commutation of quarters in accordance with his rank, with commutation of heat and light for the same as provided by law.

"VI. The laws determining the rate of pay to the claimant are as follows:

"(1). The act of May 4, 1898, 30 Stat. L. 369, under which claimant was appointed an acting assistant surgeon in the navy.

"(2). The act of March 3, 1899, 30 Stat. L. 1007, known as the Navy Personnel Act, providing that officers of the Medical Corps of the navy shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for officers of corresponding rank in the army, and granting constructive credit of five years on date of appointment.

"(3). The act of June 29, 1906, 34 Stat. L. 554, abolishing reduction of fifteen per cent (15%) for shore duty.

"(4). Revised Statutes as follows:

"Section 1466, providing that masters (lieutenants, junior grade) in the navy shall rank with first lieutenants in the army.

"Section 1168, as amended by the act of June 23, 1874, 18 Stat. L. 244, providing that assistant surgeons in the army shall rank as lieutenants of cavalry.

"Sections 1261 and 1262, providing for the pay of a lieutenant, mounted, at sixteen hundred dollars ($1,600) per year with an increase of ten per cent (10%) for each term of five years of service.

"(5). The act of June 7, 1900, 31 Stat. L. 697, providing that assistant surgeons in the navy shall rank with assistant surgeons in the army.

"(6). The acts of June 18, 1878, I Supp. R. S. 190, and June 23, 1879, I Supp. R. S. 267, and army regulations, giving commutation

of quarters at the rate of twelve dollars ($12) per room per
4 month for two rooms allowed a first lieutenant, prior to March 2, 1907; act of March 2, 1907, 34 Stat. L. 1169, allowing a first lieutenant three rooms.

"(7). Act of March 2, 1907, 34 Stat. L. 1167, allowing officers heat and light or commutation thereof, and army regulations of 1908, sections 1045, 1069.

"(8). Act of May 13, 1908, 35 Stat. L. 127, establishing a new pay table for the navy.

"No assignment or transfer of this claim, or of any part thereof or interest therein, has been made; and the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States. And the claimant claims four thousand two hundred and thirty-six dollars and fifty-two cents ($4,236.52).

"GEORGE A. & WILLIAM B. KING,
"Attorneys for Claimant.

"STATE OF FLORIDA,
County of Monroe, ss:

"George R. Plummer being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

"GEORGE R. PLUMMER.

"Subscribed and sworn to before me this 4th day of December, 1909.

[SEAL.]

"HUGH GUNN,
"Notary Publis."

5 III. *Traverse.*

Filed December 16, 1909.

In the Court of Claims of the United States.

No. 30462.

GEORGE R. PLUMMER
v.
THE UNITED STATES.

And now comes the attorney-general, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

J. Q. THOMPSON,
Assistant Attorney-General.

IV. *Submission.*

This case was submitted by Mr. George A. King for the claimant, and by Mr. F. De C. Faust for the defendants on the 16th day of December, 1909.

6 V. *Findings of Fact and Conclusion of Law.*

Filed Dec. 20, 1909.

In the Court of Claims.

No. 30462.

GEORGE R. PLUMMER
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the Court, upon the evidence makes the following:

Findings of Fact.

I.

On the 29th day of December, in the year 1902, the Navy Department issued the following circular:

"DEPARTMENT OF THE NAVY,
"BUREAU OF MEDICINE AND SURGERY,
"WASHINGTON, D. C., *December* 29, 1902.

"SIR: The Secretary of the Navy, in order to meet the exigencies of the service, has authorized the appointment of 25 acting assistant surgeons for three years' service, to have the same rank and pay as assistant surgeons in the regular service.

"The pay is as follows:

At sea	$1,650.00 a year.
On shore, with quarters	1,402.50 " "
On shore, without quarters	1,690.50 " "

"The age limit and professional examination for assistant surgeons in the regular service will be waived for applicants for appointment as acting assistant surgeons. They will be required to pass a physical examination and present satisfactory evidence to the examining board of their moral and professional standing and general fitness and aptitude for the service.

"Acting assistant surgeons will be given an opportunity if desired of being examined professionally for appointment as assistant surgeons in the regular service, provided they are within the age
7 limits (21 to 30 years).

"If you desire an appointment as an acting assistant surgeon for three years' service, application should be made immediately to the Secretary of the Navy.

"Very respectfully,
P. M. RIXEY,
"Surgeon-General, U. S. Navy."

The amount of pay stated in said circular is the pay fixed by section 1261 of the Revised Statutes for a first lieutenant, not mounted, in the army, $1,500 a year, with one longevity increase under section 1262 amounting to $150, owing to five years' constructive service allowed to officers appointed from civil life by the Naval Personnel Act, section 13, third proviso, aggregating $1,650 a year, reduced by fifteen per cent when on shore, making $1,402.50. The amount added to the pay to make up the amount of $1,690.50 consists of the allowance of $288 a year for quarters, which for an officer of relative rank of lieutenant in the army are two rooms, the commutation of which is fixed by the acts of 1878, June 18, chapter 263, section 9, and 1879, June 23, chapter 35, par. 2, I Supp. R. S. 190, 267, at $12 per room per month, making $288 a year.

II.

After making application as provided in such circular, and presenting satisfactory evidence of qualification as therein stated, the claimant, George R. Plummer, was on the first day of July, in the year 1903, appointed and commissioned an acting assistant surgeon in the Navy under the act of 1898, May 4, chapter 234, par. 4, last clause; and accepted the appointment and took the oath of office July 9, 1903.

His commission is as follows:

"Theodore Roosevelt, President of the United States of America, to All Who Shall See These Presents, Greeting:

"Know ye, that reposing special Trust and Confidence in
8 the Patriotism, Valour, Fidelity and Abilities of George R. Plummer I do appoint him an Acting Assistant Surgeon in the Navy with the rank of Lieutenant, junior grade from the 1st day of July 1903, in the service of the United States. He is therefore carefully and diligently, to discharge the Duties of an Acting Assistant Surgeon by doing and performing all Manner of Things thereto belonging.

"And I do strictly charge and require, all Officers, Seamen and Marines, under his Command to be obedient to his Orders as as Acting Assistant Surgeon. And he is to observe and follow such Orders and Directions from time to time as he shall receive from me; or the future President of the United States of America, or his Superior Officer set over him: according to the Rules and Discipline of the Navy.

"This Commission to continue in force during the pleasure of the President of the United States for the time being, or for a period of three years.

"Given under my hand at Washington, this first day of July in the year of our Lord One Thousand Nine Hundred and Three and in the 127th year of the Independence of the United States.

"THEODORE ROOSEVELT.

"By the President,
"WILLIAM H. MOODY,
"Secretary of the Navy."

III.

He served for a period of three (3) years named in his commission, was reappointed an acting assistant surgeon for three (3) years' service on July 1, 1906, and completed said period of service on June 30, 1909. During the whole period of his service he had the rank of lieutenant, junior grade. All of the service of the claimant as an acting assistant surgeon in the Navy was performed at the Naval Station, Key West, Florida, and covered the period from the day of his first reporting for duty, July 9, 1903, to June 30, 1909.

IV.

The claimant was paid during his entire time of service at the rates of pay fixed by section 1556 of the Revised Statutes for assistant surgeons in the Navy on shore duty. If it is held that he is entitled to the pay of an assistant surgeon in the regular Navy under section 13 of the Navy Personnel Act of 1899, and the act of May 13, 1908, with a credit for five (5) years' constructive service as allowed by said Navy Personnel Act; together with commutation of quarters, and heat and light for the same, he would be entitled to $1,814.78 more pay than he has received, and would also be entitled to $2,007.20 commutation of quarters, and since March 2, 1907, 34 Stat. L. 1167, to $341.88 for heat and light for quarters; a total of $4,213.86.

If the proper mode of computation of the increase since May 13, 1908, is to compute it not merely upon the base pay of the grade but upon that pay as increased by previous increases for length of service an additional amount will be due the claimant for his service since May 13, 1908, of $22.66.

V.

Before the date of the decision of the Court in the case of R. Roller Richardson v. United States, 38 C. Cls. 182, January 5, 1903, assistant surgeons in the Navy received only the pay of an officer of corresponding rank in the Army "not mounted," 5 Comp. Dec. 943. By that decision it was held that they are entitled to the pay of such an officer "mounted." This decision was not appealed from and has been accepted as the proper interpretation of the law, 10 Comp. Dec. 526. It has been applied by ruling of the Comptroller of the Treasury to passed assistant surgeons, 9 Comp. Dec. 676.

All officers of the Medical Corps in grades for which there is in the Army pay table a distinction between "mounted" and "not mounted" pay, have ever since been paid at mounted rates of pay for their services from the date the Personnel act took effect, July 1, 1899, to the present time.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, upon the authority of the cases of James S. Taylor

(38 C. Cls., 155) and Hugh T. Nelson (41 Ibid., 157), that the claimant is not entitled to recover, and his petition is therefore dismissed.

BY THE COURT.

11 VI. *Judgment of the Court.*

In the Court of Claims.

No. 30462.

GEORGE R. PLUMMER
v.
THE UNITED STATES.

At a Court of Claims held in the City of Washington, D. C., on the 20th day of December, 1909, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree that the petition of the claimant, the said George R. Plummer, be, and the same is hereby dismissed.

BY THE COURT.

12 VII. *Application for an Allowance of Appeal.*

In the Court of Claims.

No. 30462.

GEORGE R. PLUMMER
v.
THE UNITED STATES.

From the judgment rendered in the above cause on the twentieth day of December, 1909, dismissing the petition, the claimant, by his attorneys of record, makes application for and gives notice of appeal to the Supreme Court of the United States.

GEORGE A. & WILLIAM B. KING,
Attorneys for Claimant.

Filed in open Court December 22, 1909.

Whereupon it was ordered that the appeal be allowed as prayed for.

BY THE COURT.

13 In the Court of Claims.

No. 30462.

GEORGE R. PLUMMER
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the Court; of the judgment of the Court dismissing the petition; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 23d day of December, 1909.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 21,941. Court of Claims. Term No. 177. George R. Plummer, appellant, vs. The United States. Filed December 23d, 1909. File No. 21,941.

Supreme Court of the United States.

OCTOBER TERM, 1911.

Office Supreme Court, U. S.
FILED.
DEC 29 1911
JAMES H. McKENNEY
CLERK

No. 177.

GEORGE R. PLUMMER, Appellant,

v.

THE UNITED STATES.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

GEORGE A. KING,
WILLIAM B. KING,
WILLIAM E. HARVEY,
ARCHIBALD KING,
Attorneys for Appellant.

Supreme Court of the United States.

October Term, 1911.

GEORGE R. PLUMMER, *Appellant*,
v.
THE UNITED STATES. } No. 177.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

I. Statement of the Case.

This case involves the question of the rate of pay of acting assistant surgeons in the Navy. The facts will best be understood if we first give the statutes on which the case depends.

Statutes.

Revised Statutes:

SEC. 1411. The Secretary of the Navy may appoint, for temporary service, such acting assistant surgeons as the exigencies of the service may require, who shall receive the compensation of assistant surgeons.

SEC. 1556. The commissioned officers and warrant officers on the active list of the Navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employés in the Navy, shall be entitled to receive annual pay at the rates herein stated after their respective designations: * * *

Assistant surgeons, assistant paymasters, and second

assistant engineers, during the first five years after date of appointment, when at sea, $1,700; on shore duty, $1,400; on leave, or waiting orders, $1,000; after five years from such date, when at sea, $1,900; on shore duty, $1,600; on leave, or waiting orders, $1,200.

SEC. 1559. When a volunteer naval service is authorized by law, the officers therein shall be entitled to receive the same pay as officers of the same grades, respectively, in the regular Navy.

Act May 4, 1898 (30 Stat. L. 380):

The President is hereby authorized to appoint for temporary service twenty-five acting assistant surgeons, who shall have the relative rank and compensation of assistant surgeons.

Navy Personnel Act, March 3, 1899 (30 Stat. L. 1004, 1006, 1007):

An Act To reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States. (Provisos paragraphed and numbered for convenience.)

SEC. 7. * * * That all sections of the Revised Statutes which, in defining the rank of officers or positions in the Navy, contain the words "the relative rank of" are hereby amended so as to read "the rank of," but officers whose rank is so defined shall not be entitled in virtue of their rank to command in the line or in other staff corps. Neither shall this act be construed as changing the titles of officers in the staff corps of the Navy. * * *

SEC. 13. That, after June 30th, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law, for the officers of corresponding rank in the Army:

(1) **Provided*, That such officers when on shore shall

* This proviso was repealed June 29, 1906 (34 Stat. L. 554).

receive the allowances, but fifteen per centum less pay than when on sea duty; but this provision shall not apply to warrant officers commissioned under section twelve of this Act:

(2) *Provided further*, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places:

(3) *Provided further*, That naval chaplains, who do not possess relative rank, shall have the rank of lieutenant in the Navy; and that all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited, for computing their pay, with five years' service. And all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed:

(4) *And provided further*, That no provision of this Act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law:

(5) *And provided further*, That nothing in this Act shall operate to increase or reduce the pay of any officer now on the retired list of the Navy.

Act June 7, 1900 (31 Stat. L. 697):

Assistant surgeons shall rank with assistant surgeons in the Army.

Act May 13, 1908 (35 Stat. L. 127, 128):

Hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances

according to rank and length of service, and the annual pay of each grade shall be as follows:

For Admiral, $13,500;
rear-admiral, first nine, $8,000;
rear-admiral, second nine, or commodore, $6,000;
captain, $4,000;
commander, $3,500:
lieutenant-commander, $3,000;
lieutenant, $2,400;
lieutenant, junior grade, $2,000;
ensign, $1,700.

There shall be allowed and paid to each commissioned officer below the rank of rear-admiral ten per centum of his current yearly pay for each term of five years service in the Army, Navy and Marine Corps. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law: *Provided*, That the annual pay of captain shall not exceed $5,000 per annum; of commander, $4,500 per annum; and of lieutenant-commander, $4,000 per annum.

All officers on sea duty and all officers on shore duty beyond the continental limits of the United States shall while so serving receive ten per centum additional of their salaries and increase as above provided, and such increase shall commence from the date of reporting for duty on board ship or the date of sailing from the United States for shore duty beyond the seas or to join a ship in foreign waters. * * *

"The pay of all commissioned, warrant and appointed officers and enlisted men of the Navy now on the retired list shall be based on the pay, as herein provided for, of commissioned, warrant and appointed officers and enlisted men of corresponding rank and service on the active list; and all pay herein provided shall remain in force until changed by Act of Congress. Nothing herein shall be construed so as to reduce the pay or allowances now authorized by law for any commissioned, warrant or appointed officer or any enlisted man of the active or retired lists of the Navy, and all laws inconsistent with this provision are hereby repealed."

The Facts.

The findings of fact (Record, pp. 4–6) may be summarized as follows:

December 29, 1902, the Navy Department issued a circular inviting applications for appointment as acting assistant surgeons, stating that such officers were "to have the same rank and pay as assistant surgeons in the regular service" (Finding I, Record, foot p. 4). The offer was stated to be the act of the Secretary of the Navy, and was signed by the Surgeon-General, who is (Rev. Stat. § 426) the Chief of the Bureau of Medicine and Surgery, and whose orders are declared by law to be considered as emanating from the Secretary of the Navy, and "shall have full force and effect as such" (Rev. Stat. § 420). The amount of pay therein stated is that fixed by Rev. Stat. § 1261 for a first lieutenant, not mounted, in the Army, with one longevity increase as for five years' service under Rev. Stat. § 1262, owing to the five years' constructive service allowed to officers appointed from civil life by the Navy Personnel Act, § 13, proviso (3) (*ante*, p. 3), with a reduction of fifteen per cent when on shore duty as provided by proviso (1) of that Act (*ante*, p. 2), together with an allowance for quarters appropriate to the officer's rank (Finding I, last paragraph, top p. 5).

After making application as provided in that circular and presenting satisfactory evidence of qualification as therein stated, the appellant was July 1st, 1903, appointed and commissioned an acting assistant surgeon in the Navy, accepted the appointment and took the oath of office July 9, 1903 (Finding II, middle p. 5).

His commission, signed by the President (Finding II, foot p. 5) is in the regular form of a naval commission, and begins:

"Know ye, that reposing special Trust and Confidence in the Patriotism, Valour, Fidelity and Abilities of George

R. Plummer I do appoint him an Acting Assistant Surgeon in the Navy with the rank of Lieutenant, junior grade from the 1st day of July, 1903, in the service of the United States."

It directs him to discharge the duties of an acting assistant surgeon; requires all officers, seamen, and marines under his command to be obedient to his orders as an acting assistant surgeon; requires him to observe and follow such orders and directions as he shall from time to time receive from the President "or his superior officer set over him according to the Rules and Discipline of the Navy. This commission to continue in force during the pleasure of the President of the United States for the time being, or for a period of three years."

He served for the period of three years named in his commission; was reappointed an acting assistant surgeon for another period of three years on July 1, 1906, and completed said period of service on June 30, 1909. During the whole time of his service he had the rank of lieutenant, junior grade (Finding III, top p. 6).

He was paid during his entire time of service at the rates of pay fixed by section 1556 of the Revised Statutes for assistant surgeons in the Navy on shore duty. If it is held that he is entitled to the pay of an assistant surgeon in the regular Navy under section 13 of the Navy Personnel Act of 1899, and the act of May 13, 1908, with a credit for five years' constructive service as allowed by said Navy Personnel Act; together with commutation of quarters and heat and light for the same, he would be entitled to $1,814.78 more pay than he has received, and would also be entitled to $2,007.20 commutation of quarters, and since March 2, 1907, 34 Stat. L. 1167, to $341.88 for heat and light for quarters; a total of $4,213.86.

If the proper mode of computation of the increase since

May 13, 1908, is to compute it not merely upon the base pay of the grade but upon that pay as increased by previous increases for length of service an additional amount will be due the claimant for his service since May 13, 1908, of $22.66 (Finding IV, middle p. 6).

Before the date of the decision of the Court of Claims in the case of *Richardson* v. *United States*, 38 C. Cls. 182, January 5, 1903, assistant surgeons in the Navy received only the pay of an officer of corresponding rank in the Army "not mounted," 5 Comp. Dec. 943. By that decision it was held that they are entitled to the pay of such an officer "mounted." This decision was not appealed from and has been accepted as the proper interpretation of the law, 10 Comp. Dec. 526. It has been applied by ruling of the Comptroller of the Treasury to passed assistant surgeons, 9 Comp. Dec. 676.

(The *Richardson* case and the ruling of the Comptroller as mentioned, received the approval of this court in *United States* v. *Farenholt*, 206 U. S. 226.)

All officers of the Medical Corps in grades for which there is in the Army pay table a distinction between "mounted" and "not mounted" pay, have ever since been paid at mounted rates of pay for their services from the date the Personnel act took effect, July 1, 1899 (Finding V, p. 6).

Judgment and Appeal.

The Court of Claims rendered judgment against the claimant, and the claimant appealed to this court (record, p. 7).

II. Assignment of Error.

The appellant hereby assigns the following errors in the proceedings and judgment of the Court of Claims:

1. That said Court of Claims held that during the

period from July 9, 1903, to May 12, 1908, he was not entitled to the benefit of Sec. 13 of the act of March 3, 1899, known as the Navy Personnel Act (*ante*, pp. 2, 3), giving him the same pay and allowances as an officer of rank corresponding to his own in the Army, together with five years' credit on account of entry into the Navy from civil life as allowed by proviso (3) of said section.

2. That said Court of Claims held that during the period from May 13, 1908, to June 30, 1909, he was not entitled to the pay and allowances of his rank, to wit, that of lieutenant, junior grade, in the Navy, as required by the act of May 13, 1908 (*ante*, p. 4).

III. Brief of Argument.

The Question Stated.

The case turns on the construction of the words of the act of May 4, 1898 (*ante*, p. 2), "who shall have the relative rank and compensation of assistant surgeons." Also the construction of the Navy Personnel Act, Sec. 13 (*ante*, p. 2), providing that "commissioned officers of the line of the Navy and of the Medical and Pay Corps, shall receive the same pay and allowances" as "the officers of corresponding rank in the Army." Also the construction of the words of the Act of May 13, 1908 (*ante*, p. 3), "Hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances according to rank and length of service."

The decision of the Court of Claims in effect holds that the compensation fixed by law at the time of the passage of the act of 1898, authorizing the appointment of acting assistant surgeons, is by that act, so to speak, stereotyped, and that they derive no benefit from either the act of 1899 or that of 1908. This position we dispute on the following grounds:

First. That when the act of 1898 says that these officers "shall have the relative rank and compensation of assistant surgeons," it means not merely that they shall have the same rank and compensation as assistant surgeons at that time possessed, but that which those officers shall at any time be entitled to.

Second. That whether this be so or not, the words of the act of 1899, "commissioned officers of the line of the Navy, and of the Medical and Pay Corps," by direct and express terms, include them as officers of the Medical Corps of the Navy.

Third. That they are equally within the descriptive terms of the act of 1908, establishing a new pay table for the Navy, for "all commissioned officers of the active list of the Navy."

Assimilated Compensation.

It is not at all an uncommon provision of law to declare, as is done by the act of 1898, that one officer shall have the same compensation as some other officer. In such cases, whatever compensation the other officer becomes entitled to, that compensation the assimilated officer is also entitled to receive. Thus, section 12 of this same Personnel Act (30 Stat. L. 1007) provides that certain officers "shall on promotion have the same pay and allowances as are now allowed a second lieutenant in the Marine Corps." It was held by the Comptroller of the Treasury that when Congress by a subsequent law gave these second lieutenants an allowance of heat and light for their quarters, that allowance became immediately extended by force of the assimilating provision to the officers named in the 12th section of the Personnel Act (13 Comp. Dec. 821).

The present is a much stronger case because there the

law said "now allowed" whereas in the present case there is no restriction of "now." They are to have "the relative rank and compensation of assistant surgeons." This means that they are to have the same relative rank and the same compensation which may at any and all times be allowed to assistant surgeons.

Pennsylvania Decision.

This construction is in accordance with the opinion of the Supreme Court of Pennsylvania in *Kugler's Appeal* (53 Pa. State, 123), delivered by Mr. Justice Strong, afterwards a member of this court. There an act of the legislature provided that proceedings to divide or alter election districts "shall be the same as in the erection or alteration of the lines of townships." Afterwards an act was passed changing the mode of dividing or altering townships; and the question was whether that change applied also to election districts.

The court said (p. 125):

"It is manifest the legislative intent was to have but one mode of procedure for division of townships and division of election districts.

"The act of 1854 does not in terms declare that mode shall be the one existing at the time of its enactment. It was intended as a rule for future conduct, a rule, we think, always to be found when it is needed by reference to the law in regard to township division existing at the time when the rule is invoked."

And the conclusion was:

"In the absence, then, of any words in the proviso to the act of April 20th, 1854, showing an intent to limit the proceedings spoken of to those which were in force in regard to the erection or alteration of township lines at that time, we think it must be held that the rule of procedure is to be found in the law as it is when an election district is sought to be divided."

According to this decision the compensation of acting assistant surgeons appointed at any given time must be determined by the law in force for assistant surgeons at the same time.

In the same line of thought, this court in *De Lima* v. *Bidwell*, 182 U. S. 1, 197, says:

"While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope. Thus, a statute forbidding the sale of liquors to minors applies not only to minors in existence at the time the statute was enacted, but to all who are subsequently born; and ceases to apply to such as thereafter reach their majority. So, when the Constitution of the United States declares in Art. I, sec. 10, that the States shall not do certain things, this declaration operates not only upon the thirteen original States, but upon all who subsequently become such; and when Congress places certain restrictions upon the powers of a territorial legislature, such restrictions cease to operate the moment such Territory is admitted as a State."

The *Farenholt* Case.

United States v. *Farenholt*, 206 U. S. 226, is a decision construing the Act of 1900 (*ante*, p. 3), giving assistant surgeons in the Navy the same rank as assistant surgeons in the Army. After reasoning (p. 229), too long here to quote but applicable to this case, the conclusion was reached (p. 230):

"Consideration of the provisions relative to the rank and pay of officers of the Army and Navy make it evident that Congress used the words 'assistant surgeon' as descriptive of the whole class of assistant surgeons, passed as well as those not passed."

Here the court says that Congress used the words

"assistant surgeon" as descriptive of the whole class of assistant surgeons. This means acting assistant surgeons, as well as passed assistant surgeons. Indeed, it is much more closely applicable to acting than to passed assistant surgeons because the law says in so many words that acting assistant surgeons shall have the relative rank and compensation of assistant surgeons, while passed assistant surgeon is a separate office. The President has already decided the question of relative rank by giving these officers the relative rank (lieutenant, junior grade) provided by the new law for assistant surgeons of permanent commission. This relative rank clearly carries with it the corresponding pay. This was the construction first placed upon the law by all parties. The Surgeon-General of the Navy invited applications for this position of acting assistant surgeon, "to have the same rank and pay as assistant surgeons in the regular service." (Finding I, Record, pp. 4, 5). That pay was the new army pay fixed by the 13th section of the Personnel Act, as shown by the particulars stated in the circular. The President, in giving the claimant the commission shown in Finding II (p. 5), gave him the same rank as assistant surgeons in the Navy then had and not the old rank held by them in 1898, which was that of ensign. He was ordered to obey the orders of his superior officers; he became subject to trial by court-martial; his name was placed upon the official register of commissioned officers of the Navy. As this Court said in the *Reed* case (100 U. S. 13, 22): "If these officers are not in the naval service it may well be asked who are?"

The fact that the commission was only for a limited period does not affect the status of the claimant as an officer in the Navy. Very few officers of the Government hold for anything but a limited period (*Shurtleff* v. *United States*, 189 U. S. 311, 316). It is a novel doc-

trine that an officer is not entitled to the pay affixed by law to the office which he holds because he holds it only by a commission limited in duration and not for an indefinite period.

The claimant held a commission, he was in the Navy, he was in every respect a commissioned officer of the Medical Corps of the Navy, entitled by law to the relative rank and compensation of an assistant surgeon. The proper rank is given to him by his commission. How then can the compensation of an assistant surgeon in the Navy be denied to him?

The appropriations for these officers are made every year in the annual appropriation acts, not separately, but as a part of the "pay of the Navy" (34 Stat. L. 553, 1176).

In every respect they are recognized by the legislative and executive departments of the Government as a portion of the commissioned personnel of the Navy. It only remains to allow them their statutory compensation as such.

"Relative Rank" "of Assistant Surgeons."

The law gives these officers "rank." This alone is conclusive of their status as commissioned officers of the Navy, rank being a quality possessed only by military or naval persons. Army Regulations (1910), Art. 3, paragraph 7; Navy Regulations (1909), Art. 52, paragraph (*c*).

The action of the executive authority on this question of their rank is instructive. The act of 1898 (*ante*, p. 2) not only gives these acting assistant surgeons the "compensation of assistant surgeons," but it gives them the same "relative rank." The rank of an assistant surgeon upon entrance into the service was,

prior to the passage of this act in 1898, that of ensign in the Navy (Revised Statutes, sec. 1474). The lowest grade in the Medical Corps of the Navy was first made that of lieutenant, junior grade, by the provision of the act of June 7, 1900 (31 Stat. L. 697, *ante*, p. 3): "Assistant surgeons shall rank with assistant surgeons in the Army." The lowest grade in the Medical Corps of the Army being first lieutenant (Revised Statutes, section 1168) this act raised the rank of assistant surgeons in the Navy to the corresponding rank, that of lieutenant, junior grade. Both assistant surgeons and acting assistant surgeons in the Navy have since always been commissioned upon their entrance into the service as lieutenants, junior grade. If the compensation fixed by the act of 1898 remained stereotyped at the same rate as was established by laws in force at that date, so also did the relative rank.

Such, however, has not been the construction placed upon the act by the President in making these appointments. The commission of the claimant reads (Finding II, record, p. 5): "I do appoint him an acting assistant surgeon in the Navy with the rank of lieutenant, junior grade, * * * in the service of the United States." All the acting assistant surgeons in the Navy have this same rank of lieutenant, junior grade.

We have then a construction of law according to which the relative rank of the acting assistant surgeon is determined by the laws in force at the date of his appointment, but his compensation by the law in force in 1898 when his appointment was first authorized. This clearly can not be. The law gives these officers whatever relative rank and compensation assistant surgeons may at any time be entitled to. If they are to have only the compensation which assistant surgeons were entitled to in 1898, without regard to any subsequent change in the rank and compensation of assistant surgeons, they would

be commissioned only to the rank of ensign as was the case in 1898.

The executive authority has, in commissioning them, adopted the view that the relative rank is to be that which assistant surgeons in the Navy are at any time entitled to. This is shown by the rank given them in their commissions. It is also clearly shown by the circular issued by the Navy Department (shown in Finding I, p. 4; see explanation thereof, top p. 5) that that department understood that their rate of pay was likewise to conform to that of assistant surgeons in the Navy. The status of these officers as to rank and pay must be consistent. Their compensation must be placed upon the same basis as their rank, that is, it must conform to that of assistant surgeons as now existing.

Meaning of Navy Personnel Act.

No opinion was delivered in the present case. It refers, however, to the former opinions of the court in *Taylor* v. *United States*, 38 C. Cls. 155 and *Nelson* v. *United States*, 41 C. Cls. 157, as authority for the adverse decision. The argument against the application of the Navy Personnel Act to these officers is thus stated in the *Taylor* case, 38 C. Cls. 161, 162:

"In the act March 3, 1899, we fail to find any express provision applying to officers of the Navy in the temporary service. That was 'An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States,' evidently referring to the officers of the regular Navy, as it certainly could not be contended that the Congress had in view the reorganization of the officers in the temporary service, or that by that act they intended to incorporate them into the permanent service."

But this court has said:

"The title of an act furnishes little aid in the construction of its provisions." "It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature." (*Hadden* v. *The Collector*, 5 Wallace, 107, 110.)

In this instance, the title would certainly suggest no idea that Congress intended to *exclude* from its operation any of the commissioned officers of the Navy for the sole reason that their commissions were for a term of years instead of for an indefinite period. Did Congress desire to increase the efficiency of officers holding permanent commissions but to have inefficient officers with temporary commissions? Besides, can an act of Congress be construed in accordance with any such loose presumption as this? Must it not rather be read according to its terms?

The words of the 13th section, providing for the pay of certain officers, are "commissioned officers." This officer is a commissioned officer. "Of the line and of the Medical and Pay Corps." This officer is an officer of the Medical Corps. He is so commissioned. He was so carried during all the time of his holding the office. In the Navy Register, January 1, 1904, pp. 58, 59, these officers are included as regular officers of the Navy under the head of "Medical Corps." He was paid from the appropriation "Pay of the Navy" (32 Stat. L. 1177). Thus, these officers have commissions, they have naval rank, they are commanded in the regular form of a naval commission to observe and follow all orders and directions received from the President or their superior officers according to the rules and discipline of the Navy and all officers, seamen and marines are enjoined to be obedient to their orders (Finding II, p. 5). They are subject to trial by court-martial.

Attorney-General Bates gave, in 1863, an opinion to

the Secretary of the Navy, whether under a law providing for "commissioned officers" on courts-martial, "acting" officers appointed for temporary service under the Act of July 24, 1861 (12 Stat. L. 272, 273, referred to, *post*, p. 19), may be considered as commissioned officers within the meaning of the law. He answers (10 Opinions Attorneys-General, 522, 523):

"I have not the slightest doubt about it. They are commissioned officers, within the meaning of the act of July 17, 1862. The word *commissioned* is used in the act only to indicate the rank of officers capable of serving on a general court-martial, and to distinguish them from *non-commissioned* officers and *petty* officers—terms well understood in the Navy and the country.

"Their appointment may, indeed, be temporary, but as long as it lasts, they are, to all intents and purposes, officers of the Navy; and they are as fully commissioned as any other officers of the Navy are, to perform all naval services and duties appropriate to their rank."

This expression accurately fits the present case, "They are to all intents and purposes officers of the Navy; and they are as fully commissioned as any other officers of the Navy are." The words "commissioned officers of the Medical Corps" in the 13th section of the Personnel Act therefore apply literally and in terms to them, as they do also in spirit.

Moreover, the Navy Personnel Act is full of provisions in regard to the enlisted personnel, who are enlisted only for a term of years. This shows that there was no intention to restrict its operation to those holding their positions by an indefinite term.

So, too, the Attorney-General held in 1906 that contract surgeons appointed only by the Surgeon-General of the Army "are officers of the Medical Department, and belong to the Army, and their service is in and for the Army" (26 Opinions Attorneys-General, 74, 75).

So, too, paymasters' clerks in the Navy are held to be "officers of the Navy" within the meaning of the retirement provisions of the Act of May 13th, 1908, the pay provisions of which (*ante*, pp. 3, 4) are involved in this case (27 Opinions, 157).

This Court, too, has held, *United States* v. *La Tourrette*, 151 U. S. 572, that an army officer in computing his longevity pay is entitled to compute as a portion of his military service, service as a post chaplain, though such officers were at that time not appointed by the President, but employed by the officers composing the council of administration at the post with the approval of the Secretary of War. It was said (p. 576) that such officers "should be considered, according to the understanding and intention of Congress, as holding the office and rank of chaplain in the Army, and consequently as in the military service, within the meaning of the longevity pay act."

"Acting" Officers.

The appointment of officers having the word "acting" preceding their official title has at several times been authorized in the Army or the Navy, sometimes by executive action only, sometimes with legislative authority. In all such cases an officer lawfully so appointed has had conceded to him the full rank and compensation of the office to which he was appointed as "acting." In *United States* v. *White* (28 Federal Cases, No. 16,684, p. 586), a navy agent was appointed acting purser, the office of purser being what is now known as paymaster. Chief Justice Taney held that the appointment was lawfully made and that an officer so appointed was entitled to the compensation fixed by law for a purser in the Navy. He said (p. 587):

"The Secretary of the Navy had a right to appoint a purser *ad interim*, usually called acting purser, to discharge the duties of purser at this establishment, if the demands of the public service elsewhere, or any other sufficient cause, put it out of his power to employ a purser regularly appointed.

"The act of Congress fixes the salary of purser, when not otherwise provided for, at $1,500 a year. As the defendant performed all the duties of the office, and performed them in the name and in the character of purser, he is entitled to the compensation which the law has provided for such services."

So too, during the Civil War, Congress by a number of acts, authorized or recognized the appointment of "acting" officers. By act of July 24, 1861, section 2 (12 Stat. L. 272, 273), Congress ratified the appointment of acting lieutenants, acting paymasters, acting assistant surgeons, acting masters and masters' mates. We have seen (*ante*, pp. 16, 17) that these officers were held capable of sitting on courts-martial.

July 16, 1862, it was provided that the pay of all the "acting" officers appointed by virtue of the act of 1861 "shall be the same as that of officers of a like grade in the regular Navy" (section 20, 12 Stat. L. 587).

These appointments were again confirmed and the rate of compensation allowed legalized by act of March 3, 1863, section 3 (12 Stat. L. 818). By act of March 3, 1865, several of these "acting" officers are recognized and their appointments confirmed, the provisions of section 6 being especially significant (13 Stat. L. 539):

"That acting passed assistant surgeons and acting surgeons may be appointed in the same manner as acting assistant surgeons are now appointed, who shall receive the compensation of their respective grades."

The provision for acting assistant surgeons was carried

into the Revised Statutes as section 1411, all provisions for the appointment of "acting" officers in the Navy having been in the meantime repealed except as to assistant surgeons (act July 15, 1870, section 13, 16 Stat. L. 334).

Could there be a stronger expression of the intention of Congress that acting assistant surgeons should at all times have the same rank and the same compensation as the regular assistant surgeons with whom they were to serve?

It was this legislation which formed the basis of that of 1898, providing for acting assistant surgeons. That act should be construed as a continuation of the same legislative policy.

The legislative policy is further shown by section 1381 of the Revised Statutes, which provides for the appointment of "acting" paymasters who "shall be entitled to receive the pay of such grade while so acting."

These suggestions show that permanency of service has never been applied as a test of being in the Army or the Navy or of being entitled to pay as such.

Promise of the Department.

The Secretary of the Navy, by public circular, embodied in the Findings of Fact, invited applications for appointment as acting assistant surgeons, stating that such officers were "to have the same rank and pay as assistant surgeons in the regular service" (Finding I, p. 4). That pay was specifically stated. The offer was stated to be the act of the Secretary of the Navy, and was signed by the Chief of the Bureau of Medicine and Surgery, whose orders are declared by law to be considered as emanating from the Secretary of the Navy and "shall have full force and effect as such" (Revised Statutes, section 420).

In this particular, the case is in all respects analogous to that of *Thurber* v. *United States*, 40 C. Cls. 489, decided May 15, 1905. There the Department, by a similar cir-

cular, invited applications for a certain office, stating what the salary was to be. The court said (conclusion of opinion, p. 492):

"The services of the claimant were enlisted after the promulgation of this construction of the act and no doubt under the belief that its terms would be fully complied with.

"While we entertain some doubt as to the correctness of this ruling, yet we are inclined to follow the construction so given by the Navy Department."

In this case, as in that, a young professional man whose services were solicited by the Government was induced to relinquish private life and accept a position under the Government, on the representation that he would receive compensation upon a certain basis.

The position of the parties having thus been changed and it being impossible to restore them to their former position, the Government is bound by a species of equitable estoppel not to shift the ground and insist that a mistake was committed in the offer of compensation by its authorized officer.

As was said by this court in *United States* v. *Alabama Great Southern Railway Company*, 142 U. S. 615, 621, affirming 25 C. Cls. 30:

"It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such a manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government."

Were there any doubt as to the proper rate of pay of these officers, the construction placed upon the law by the circular issued by the Navy Department, which they had the right to look upon as authoritative and under which

many young physicians entered the service, should be regarded as decisive.

Difficulty of Filling Medical Corps.

The argument *ab inconvenienti*, while not of itself conclusive, may properly have weight, if the case be otherwise doubtful.

In 1906 the Surgeon-General of the Navy, in an official report to the Secretary of the Navy, made this urgent appeal:

"The present vacancies in the Medical Corps number 44, with 25 additional vacancies to be filled on January 1st. The urgent need for filling these vacancies (69 in number) is more and more apparent to the Bureau every day. Every effort has been made to fill these vacancies by qualified men." (Senate Document No. 115, 60th Congress, 1st Session, Personnel of the Navy and Marine Corps, p. 50.)

The Surgeon-General of the Army, in a memorandum prepared for the President, said:

"It must also be borne in mind that the Medical Department must draw its recruits from a profession which in its higher grades is by no means overcrowded, so that the position has to seek the candidate, and a very slight diminution in inducement offered very seriously affects the supply. This has been repeatedly shown in the experience of the Medical Corps of both the Army and Navy. For example, the Naval Medical Corps was for many years unable to fill up its number because junior medical officers were required to mess for the first three years with the midshipmen instead of in the wardroom. And the Medical Corps of the Army, in spite of strenuous efforts to attract candidates, has been unable to fill the vacancies created by the reorganization of 1901 as soon as the injurious effects of that reorganization upon the prospects of the Corps became known at the medical centers. In both services it has been found necessary to

send officers to the medical colleges to make addresses for the purpose of attracting candidates, and this without avail as far as the Medical Department of the Army is concerned." (House Report No. 20, 60th Congress, 1st Session, p. 9.)

The present accomplished Surgeon-General of the Navy in his Annual Report for 1909 (Navy Department Annual Reports, 1909, p. 851) complains of the difficulty of getting young physicians to enter the naval medical service, comparing it unfavorably with the inducements offered by the Army.

Again in his annual report for 1910 (Navy Department Annual Reports 1910, p. 641) he says, under the heading "Acting Assistant Surgeons":

"Under the conditions of low pay and no allowances, it has been impossible to obtain the number (25) allowed by law," etc.

The latest Navy Register, that for January 1, 1911, shows (pp. 76, 77) only three of these officers in the service, though the law allows twenty-five!

This is the very condition of things which the law intended to prevent when it gave these officers the same rank and pay as regular Assistant Surgeons.

There could hardly be a greater discouragement against entrance into the Medical Corps of the Navy than to give an officer a certain grade of rank on entering the corps, and then allow him a rate of pay far less than is allowed any other officer of corresponding grade in either the Army or the Navy.

The computation of pay of these officers according to the old pay table contained in section 1556 of the Revised Statutes, now discarded for every other officer in the Navy, is not only contrary to the expressed will of Congress but is injurious to the interests of the service. Proper

inducements must be offered to medical men to attract them to enter the Medical Corps either of the Army or of the Navy. Congress recognized these appeals in 1908, as it had previous ones in 1899, and increased the pay of the medical officers of the Navy. The legislative policy thus emphatically declared in response to repeated and urgent appeals of the Surgeons-General of both Army and Navy should be carried out by awarding to these officers that which the law in explicit terms gives them, the "compensation of assistant surgeons."

Mode of Computation.

Should the decision of the main question be favorable to the appellant, a subordinate question will arise as to the mode of computation of his pay. In computing the increase of pay for length of service, the Court of Claims has found (Finding IV, last paragraph, record, middle p. 6):

"If the proper mode of computation of the increase since May 13, 1908, is to compute it not merely upon the base pay of the grade, but upon that pay as increased by previous increases for length of service an additional amount will be due the claimant for his service since May 13, 1908, of $22.26."

The question raised by this finding admits of easy solution in the light of the previous decisions of this court. The words of the act of 1908 are (*ante*, p. 4), "ten per centum of his current yearly pay for each term of five years service," etc.

Construing the same words in a previous statute, this court has said, *United States* v. *Tyler*, 105 U. S. 244, 246:

"We also hold that the words 'current yearly pay,'

in sect. 1262, require that, when the increased pay for any period of five years is to commence, the ten per cent must be counted on the regular salary added to its increase by any previous periods of five years; so that the original salary of the rank and any additions of ten per cent previously earned for periods of five years constitute the current yearly pay on which said ten per cent is to be calculated."

A somewhat similar question came before this court in *United States* v. *Mills*, 197 U. S. 223. The *Tyler* case is there explained and applied to the term "pay proper" used in a subsequent statute, and was held to be identical in signification. In enacting the new pay statute of 1908, Congress has employed the same words which were construed by this court in the *Tyler* case, approved and followed in the *Mills* case. As a matter of course, they must receive the same construction.

As Attorney-General Moody, later of this court, said in an opinion, 25 Opinions Attorneys-General, 309:

"It is a general rule of interpretation that the legislature is presumed to know decisions of the courts construing its language, so that if the tribunals have given a certain construction and the legislature in a new law uses the same or practically the same language, without negativing the construction adopted by the courts, it will be presumed that the legislature means what the courts have said."

Sewing Machine Companies, 18 Wall. 553, 584.
The Abbotsford, 98 U. S. 440, 444.

The question arising on this finding should therefore be decided in favor of the computation of the increase, "not merely upon the base pay of the grade, but upon that pay as increased by previous increases for length of service."

Conclusion.

It is therefore submitted that the judgment of the Court of Claims should be reversed and the cause remanded with directions to allow the appellant pay according to the new provisions, the acts of 1899 (*ante*, p. 2), and 1908 (*ante*, pp. 3, 4), providing for the pay of officers of the Navy, and not according to the obsolete provisions of Rev. Stat. Sec. 1556 (*ante*, pp. 1, 2).

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Supreme Court of the United States.

October Term, 1911.

GEORGE R. PLUMMER, *Appellant*,
v.
THE UNITED STATES. } No. 177.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT IN REPLY.

Pay of Acting Assistant Surgeons.

Reference is made in the brief for the United States (p. 10) to the supposed absurdity of allowing an officer appointed for a period of only three years credit for constructive service of five years upon the date of his appointment.

The allowance of such a credit not only involves no incongruity, but as a matter of fact there is a class of officers who now receive it, although holding office by a term of shorter and less certain duration than acting assistant surgeons. We refer to paymasters' clerks. "Paymasters' clerks who were in the service at the time of the passage of the Act of May 13, 1908, and those appointed since that date are entitled to credit of five years constructive service if appointed from civil life," although "the appointment of a paymaster's clerk termi-

nates by operation of law simultaneously with the termination of the duty entitling the pay officer to a clerk." (Navy Pay Tables contained in Official Navy Register, January 1, 1911, p. 272, paragraphs 4, 5.) This is in pursuance of the provisions of law contained in the Act of May 13, 1908 (35 Stat. L. 128), amended June 24, 1910 (36 Stat. L. middle p. 606), as construed by the Comptroller of the Treasury (15 Comp. Dec. 524; 17 Comp. Dec. 189).

The policy expressed in Sec. 1559 of the Revised Statutes (brief for appellant, p. 2), of giving volunteers appointed for temporary service the same pay as officers in the regular Navy, shows that it is not only not opposed to the legislative policy, but distinctly in accordance with it, to allow officers appointed for temporary service the same advantages in all respects as officers permanently appointed to the regular Navy.

It is suggested in the brief for the United States (pp. 10, 11) that the argument made in behalf of the appellant based upon the circular contained in the record (p. 4) is of no force because the appellant was not appointed until July 1, 1903, and the Court of Claims had decided adversely to the contention now made on January 5, 1903 (*Taylor* v. *United States*, 38 C. Cls. 155). This view assumes that a young physician knew in June, 1903, of a decision of the Court of Claims rendered January 5, 1903, and first published in a volume containing cases decided as late as December 5, 1903 (38 C. Cls. 762), as against a circular specially addressed by the Navy Department to physicians contemplating admission to the Medical Corps of the Navy, under which circular the application was made (Finding II, record, p. 5). The appellant is clearly entitled to the benefit of the official representation upon the faith of which he acted in applying for appointment.

Mode of Computation of Pay.

The brief for the United States (pp. 11–18) asks that the words "current yearly pay" in the Navy Pay Act of 1908, be construed as synonymous with "yearly pay of the grade." Both these expressions occur in the passage involved (quoted in brief for the United States, near top p. 12). The first sentence says that the officer shall get "ten per centum of his current yearly pay" for each five years' service; the second, that the total increase shall not "exceed forty per centum on the yearly pay of the grade." Each of these is a technical expression. Each of them had at the date of the passage of the act received a construction from this court; the former in *United States* v. *Tyler*, 105 U. S. 244, 246; the latter in *United States* v. *Miller*, 208 U. S. 32, 37, 38. It should require strong argument to show that expressions thus authoritatively defined as differing in meaning were used by Congress in the same passage of a statute as synonymous.

A Settled Judicial Construction.

As this expression "current yearly pay" received a judicial construction in *United States* v. *Tyler*, 105 U. S. 244, 246, there is no room for inference or construction when the same expression is repeated in a subsequent statute.

"Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress, as thus plainly expressed." (*Dewey* v. *United States*, 178 U. S. 510, 521.)

This obvious and natural interpretation of the statute according to the literal meaning of the words used is met by counsel for the United States with a suggestion (p. 18

of brief for United States) "that the phrase 'current yearly pay' was inadvertently used by the framers of the Navy Act." But an inadvertent use of words can never be attributed to the law-making power. To make such an argument is to confess that the language used does not support the construction contended for.

United States v. *Bowen*, 100 U. S. 508, affirming 14 C. Cls. 162, is a case where Congress in enacting a certain section of the Revised Statutes, instead of re-enacting the law as it stood at that date, recurred to the language of an older statute.

The court held that the only construction to be given to the revision was that of the ordinary grammatical signification of the words, which, in that case, as in this, changed previously existing law.

This is a much stronger case because the Revised Statutes were primarily intended as a re-enactment of existing legislation; while the Act of 1908 does not purport to be anything but new legislation.

A similar argument was addressed to the court in *United States* v. *Goldenberg*, 168 U. S. 95, in support of a construction which would make one clause of a statutory provision apply to and limit another clause of the same statute. But the court said (pp. 102, 103):

"In the latter no time is mentioned, and, the clauses being independent, there is no grammatical warrant for taking the specification of time from the one and incorporating it in the other.

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only

arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specially provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provison for the time of payment does not offend the moral sense, *Holy Trinity Church* v. *United States*, 143 U. S. 457; it involves no injustice, oppression or absurdity, *United States* v. *Kirby*, 7 Wall. 482; *McKee* v. *United States*, 164 U. S. 287; there is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other."

So in this case. It would do violence to the language used to say that when Congress spoke of "current yearly pay" in one phrase and of "the yearly pay of the grade" in the next, the former phrase is to be construed as a mere synonym of the latter.

The brief for the United States (p. 14) concedes:

"It is of course an elementary rule of statutory construction that where the legislature uses words in an enactment which have been judicially construed it is presumed to have used them in the sense in which the words have been thus construed."

This is the same rule enunciated in the case of the *Sewing Machine Companies*, 18 Wall. 553, 584:

"That the well-established rule applies in construing the later act, that words and phrases, the meaning of which in a statute have been ascertained by judicial interpretation, are, when used in a subsequent statute, to be understood in the same sense."

The Act of June 30, 1882 (22 Stat. L. 118, quoted in brief for the United States pp. 12, 13), construed in *United States* v. *Miller*, 208 U. S. 32, 37, 38, is not and does not purport to be a legislative construction of Revised

Statutes, Sec. 1262. It is the enactment of a new rule. The Navy Pay Act of 1908 returns to the old rule of Sec. 1262. It must necessarily receive the same construction as was given to the same words in the *Tyler* case.

No Identity with Army Pay.

But it is contended that officers of the Navy must necessarily get the same longevity increase as those of the Army. It is said (brief for the United States, p. 15):

"That Congress intended by these two enactments to place all commissioned officers of the Army and Navy on an exact equality as to pay and allowances," etc.

It would be an extraordinary doctrine of statutory construction that because Congress has at about the same time enacted two independent statutes differing in language, but similar in general character, they must be treated as absolutely identical in purpose. On the contrary, Congress has in effect forbidden a construction of the Navy Act of 1908 by analogy to the provisions of the Army Act of 1908.

A proviso of the Army Act (35 Stat. L. 108, *post*, p. 14), declares:

"That nothing in this section is intended to increase or change or shall be construed as increasing or changing the present pay or allowances of any officer in the United States Navy; and section 13 of an Act entitled 'An Act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States,' approved March 3rd, 1899, shall not be construed as changing the pay of any naval officer by reason of the provisions of this Act."

The argument made for the United States seeks in effect to accomplish by indirection what Congress has said shall not be directly done.

Moreover, a comparison of the text of the two acts shows that they differ in many of their provisions. In order to present the text of the two in convenient form for comparison, we annex to this brief as Appendix A (*post*, pp. 13, 14), all of the text of the Army Act which can be in any way material, and as Appendix B (*post*, pp. 14–16), all the material text of the Navy Act.

Congressional Reports.

References are made in the brief for the United States to both reports and debates in Congress. We think the court will find that these are either so inapplicable, or so conflicting as to throw no light on the question.

In *Bates* v. *Sulzberger*, 157 U. S. 1, 41, 42, the court said:

"And upon the face of the act, as it finally passed, there are such alterations of the prior law as to impose upon this court the responsibility of determining the effect of such alterations. We can not accept as controlling, much less conclusive, the opinion of the House Committee on the Revision of the Laws of the United States, as reported by Mr. Jenckes, that the bill it reported embodied only the existing law. Nor can we assume that the House of Representatives, much less the Senate, based their action upon the opinion of individual members of the House as to the scope and legal effect of the report of the revisers."

These remarks are exceedingly pertinent in their application to the question here presented. The report quoted at middle p. 16 of the brief of the United States, House Report No. 1224, 60th Congress, 1st session, was made upon a different bill from the one which became a law. The bill there reported, House Bill 17229, provided that the pay and allowances of officers of the Navy "shall be the same as the pay and allowances of officers of corresponding rank in the Army." This was in substance a re-enactment

with some extension of the provisions of the existing Sec. 13 of the Navy Personnel Act (30 Stat. L. 1007). Thus the language of the report is inapplicable to the construction of the statute which was finally enacted.

Nor does the statement of the House conferees (brief for United States, paragraph 3, pp. 16, 17), on the act which did become a law declare that there was to be an absolute identity of Navy pay with Army, but only a general correspondence.

Congressional Debates.

Of even less force as guides to construction are the extracts from the debate, quoted in brief for the United States (paragraph 4, pp. 17, 18). This court has said, *United States* v. *Union Pacific Railroad*, 91 U. S. 72, 79:

"In construing an act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used."

The reason is stated in *United States* v. *Freight Association*, 166 U. S. 290, 318, 319:

"The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

The statement here made as a mere possibility, "those

who spoke might differ from each other," is in this instance an actual fact. When the Navy bill was before the Senate, the following question was asked by the Chairman of the Committee on Military Affairs and thus answered by the Chairman of the Committee on Naval Affairs (Congressional Record, Vol. 42, part 6, pp. 5112, 5113):

"Mr. WARREN. I want to ask the Senator another question. In view of the fact that for many years the pay has been the same in the Army and the Navy for corresponding rank, I ask the Senator if it is his intention to change that comity between the two bodies.

"Mr. HALE. It has always been claimed by the Navy that their pay should be rather more than that of the Army, because it is service that calls them away from home, and there are more hardships and more expenses. We have observed that in the provisions for the rank and file for the seamen of the Navy. If the two bills go through, the enlisted men and petty officers in the Navy will receive some 10 or 15 per cent more than the Army, for the reason I have indicated. Whether that applies with the same force to the higher rank of officers, I can not yet tell, but my mind is entirely open with regard to it. Considering this general proposition, I think the two services ought to be on as near the same basis as is possible, and I shall try to bring that about."

Thus the statement of the Senator in charge of the legislation which ultimately became this very Navy Act of 1908, shows that it was not expected to produce an exact identity of pay between the Army and Navy, and that where there was to be any difference, it was to be in favor of the Navy. There is therefore no absurdity in the Navy having the benefit of a slightly more favorable computation of the increase. It is only what this passage of the debate would lead us to expect.

Variations between Army and Navy Pay.

A few provisions showing other existing differences of pay of the Army and the Navy may properly be referred to in order to show how little foundation there is for the position that these two statutes establish an absolute identity of pay between the officers of the Army and of the Navy.

There is another kind of ten per cent increase given by law for service of a special kind or in a special place. This increase for the Navy is as follows:

"All officers on sea duty, and all officers on shore duty beyond the continental limits of the United States shall, while so serving, receive ten per centum additional of their salaries and increase as above provided," etc. (35 Stat. L. 128, *post*, p. 15).

Thus, officers of the Navy by express provision of law now get a ten per cent increase whenever they go on sea duty, even upon a receiving ship anchored at a wharf (*United States* v. *Strong*, 125 U. S. 656), although this court in 1904 rejected a similar claim under the previously existing law, because "it is the natural and normal duty of navy officers to engage in sea service, cruise in foreign waters, and lie up in foreign ports" (*United States* v. *Thomas*, 195 U. S. 418, 421).

The corresponding provision of the Army Act of 1908 (35 Stat. L. 110, *post*, p. 14), is "That increase of pay for service beyond the limits of the States comprising the Union, and the territories of the United States contiguous thereto, shall be as now provided by law."

The law then and still giving ten per cent increase to army officers for such service is contained in the Act of June 30, 1902 (32 Stat. L. 512). That Act, as construed by the highest authority which has yet passed upon it (*LaFitte* v. *United States*, 43 C. Cls. 166), gives the

increase only for service on land, and even then only when the officer is definitely assigned to some recognized foreign or colonial station (*Carden* v. *United States*, 45 C. Cls. 171). When so great a discrimination as this is made in clear terms between the Army and the Navy on one kind of a ten per cent increase, it is only natural to find a slight difference in favor of the Navy on another kind of ten per cent increase.

And certain staff officers of the Navy by virtue of the provision (35 Stat. L. 128, *post*, p. 16):

"Nothing herein shall be construed so as to reduce the pay or allowances now authorized by law for any commissioned, warrant or appointed officer," etc., receive a rate of pay above that of any officers of corresponding rank in the Army (15 Comp. Dec. 174).

So, too, as to mileage allowance for travel on duty, officers of the Navy receive eight cents a mile (Act of March 3, 1901, 31 Stat. L. 1029), while those of the Army receive but seven cents (Act of June 12, 1906, 34 Stat. L. 246).

Separate Provisions for Army and Navy.

These differences show that there was no attempt by the enactment of the two statutes of 1908 to secure exact identity of pay in the two services. Rather, indeed, might it be said that the embarrassment and inconvenience caused by the attempt to fix the pay of the Navy by assimilation to that of the Army, as was done by the Navy Personnel Act of 1899 (brief for the appellant, near foot p. 2), induced Congress to return to the older plan of legislating separately for the two services.

The reports of the Court of Claims from volumes 36 to 45 contain thirty-nine opinions construing the Personnel Act in its various phases, besides many judgments rendered without opinions. Of these cases a considerable

number, though constituting only a small proportion of the whole, have reached this court on appeal. *Rodgers* v. *United States*, 185 U. S. 83; *White* v. *United States*, 191 U. S. 545; *Gibson* v. *United States*, 194 U. S. 182; *United States* v. *Thomas*, 195 U. S. 418; *United States* v. *Crosley*, 196 U. S. 327; *United States* v. *Farenholt*, 206 U. S. 226; *United States* v. *Miller*, 208 U. S. 32.

It is fair to presume that the embarrassment arising from the attempt to fix pay by assimilation, of which indeed this very case in its principal feature is an example, was at least one cause for legislating for the two services by different statutes.

Opinion of Judge-Advocate-General of Navy.

The Judge-Advocate-General of the Navy on July 1, 1908, gave an official opinion upon the construction of this statute. This opinion, though not published in full at the time, is alluded to in the Army and Navy Register for July 25, 1908, p. 7. This opinion, under the decision of this court, is one of those public documents of which the court may be called upon to take judicial notice. In *United States* v. *Teschmaker*, 22 How. 392, 405, the court said of the Mexican Archives:

"These archives are public documents which the court has a right to consult even if not made formal proof in the case."

And in *The Paquete Habana*, 175 U. S. 677, 696:

"Counsel have referred to records of the Navy Department which this court is clearly authorized to consult upon such a question."

See also *Romero* v. *United States*, 1 Wall. 721; *Knight* v. *U. S. Land Association*, 142 U. S. 161, 169.

We therefore annex as Appendix C to this brief (*post*,

pp. 16–19), a copy of this opinion. This is the construction placed upon the act by the chief law officer of the Department primarily concerned. It is entitled to the weight always given by the court to an opinion of the Navy Department upon such a question (*United States* v. *Moore*, 95 U. S. 760, 763).

The following passage (*post*, pp. 18, 19), succinctly shows the conclusion arrived at by the Judge-Advocate-General.

"Upon consideration, the fact that Congress, after having changed the method of computing longevity pay by the above enactment, reverted to its former language in passing the act approved May 13, 1908, would seem to show only more clearly that it intended thereby to restore the previous method of computing such increased pay. The act of June 30, 1882, above quoted, does not purport to be a legislative construction of the words 'current yearly pay,' but, on the contrary, as plainly appears from its language, merely changes the method of computing the longevity increase by basing such increase upon the *grade pay* instead of the 'current yearly pay,' as provided by the previous law. This seems to be the view taken by the Supreme Court in construing the act of June 30, 1882, its decision apparently recognizing 'current yearly pay' and 'yearly pay of the grade' to be two entirely different things (*United States* v. *Miller*, 208 U. S. p. 32, 38)."

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellant.

APPENDIX A.

Army Pay Statute of May 11, 1908.

[Paragraphed for convenience.]
[From 35 Stat. L. 108, 110.]

That hereafter the annual pay of officers of the Army of the several grades herein mentioned shall be as follows: Major-general, $8000; brigadier-general, $6000; col-

onel, $4000; lieutenant-colonel, $3500; major, $3000; captain, $2400; first lieutenant, $2000; second lieutenant, $1700. And the pay of cadets at the Military Academy shall hereafter be $600 a year.

That hereafter the United States shall furnish mounts and horse equipments for all officers of the Army below the grade of major required to be mounted, but in case any officer below the grade of major required to be mounted provides himself with suitable mounts at his own expense, he shall receive an addition to his pay of $150 per annum if he provides one mount, and $200 per annum if he provides two mounts.

Section 1267 of the Revised Statutes of the United States is hereby amended to read as follows: "In no case shall the pay of a colonel exceed $5000 a year; the pay of a lieutenant-colonel exceed $4500 a year, or the pay of a major exceed $4000 a year:"

Provided, That nothing in this section is intended to increase or change or shall be construed as increasing or changing the present pay or allowances of any officer in the United States Navy; and section 13 of an Act entitled "An Act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States," approved March 3rd, 1899, shall not be construed as changing the pay of any naval officer by reason of the provisions of this Act. * * *

That increase of pay for service beyond the limits of the States comprising the Union, and the territories of the United States contiguous thereto, shall be as now provided by law. * * *

That nothing herein contained shall be construed so as to reduce the pay or allowances now authorized by law for any officer or enlisted man of the Army; and all laws or parts of laws inconsistent with the provisions of this Act are hereby repealed. (p. 110).

APPENDIX B.

Navy Pay Statute of May 13, 1908.

[From 35 Stat. L. 127, 128.]

Hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances

according to rank and length of service, and the annual pay of each grade shall be as follows:

For admiral, $13,500; rear-admiral, first nine, $8000; rear-admiral, second nine, or commodore, $6000; captain, $4000; commander, $3500; lieutenant-commander, $3000; lieutenant, $2400; lieutenant, junior grade, $2000; ensign, $1700.

There shall be allowed and paid to each commissioned officer below the rank of rear-admiral ten per centum of his current yearly pay for each term of five years service in the Army, Navy and Marine Corps. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law: *Provided*, That the annual pay of captain shall not exceed $5000 per annum; of commander, $4500 per annum; and of lieutenant-commander, $4000 per annum.

All officers on sea duty and all officers on shore duty beyond the continental limits of the United States shall while so serving receive ten per centum additional of their salaries and increase as above provided, and such increase shall commence from the date of reporting for duty on board ship or the date of sailing from the United States for shore duty beyond the seas or to join a ship in foreign waters.

The pay of midshipmen shall hereafter be $600 per annum while at the Naval Academy, and $1400 per annum after graduation from the Naval Academy.

The pay of all warrant officers and mates is hereby increased twenty-five per centum, and all paymasters' clerks shall, while on duty, receive the same pay and allowances as warrant officers of like length of service in the Navy. The pay of all active and retired enlisted men of the Navy is hereby increased ten per centum:

Provided further, That the pay and allowances of chiefs of bureaus in the Navy Department shall be the highest pay of the grade to which they belong, and not below that of rear-admiral of the lower nine, and that the pay and allowances of chaplains in the Navy shall in no case exceed that provided for lieutenant-commanders.

Aids to rear-admirals embraced in the nine lower num-

bers of that grade shall each receive $150 additional per annum, and aids to all other rear-admirals, $200 additional per annum each.

When an officer of the Navy has been thirty years in the service, he may, upon his own application, in the discretion of the President, be retired from active service and placed upon the retired list with three-fourths of the highest pay of his grade.

And provided further, That any officer of the Navy who is now serving or shall hereafter serve as chief of a bureau in the Navy Department, and shall subsequently be retired, shall be retired with the rank, pay and allowances authorized by law for the retirement of such bureau chief.

The pay of all commissioned, warrant and appointed officers and enlisted men of the Navy now on the retired list shall be based on the pay, as herein provided for, of commissioned, warrant and appointed officers and enlisted men of corresponding rank and service on the active list; and all pay herein provided shall remain in force until changed by Act of Congress.

Nothing herein shall be construed so as to reduce the pay or allowances now authorized by law for any commissioned, warrant or appointed officer or any enlisted man of the active or retired lists of the Navy, and all laws inconsistent with this provision are hereby repealed.

APPENDIX C.

NAVY DEPARTMENT,
OFFICE OF THE JUDGE-ADVOCATE-GENERAL,
WASHINGTON, *July 1, 1908.*

MEMORANDUM FOR THE SECRETARY.

The naval appropriation act of May 13, 1908, contains the following provision:

"There shall be allowed and paid to each commissioned officer below the rank of rear-admiral ten per centum of his current yearly pay for each term of five years service in the Army, Navy and Marine Corps."

Paymaster Henry de F. Mel, U. S. N., in a letter dated

May 28, 1908, addressed to the Comptroller of the Treasury, submits a number of questions arising under the act of May 13, 1908, with request for decision, among others the following:

"I am being paid as a paymaster with the rank of lieutenant, having five years' actual service and five years' constructive service. Am I justified in computing the credit for the second five years' service as ten per cent of my base pay of $2,400, or as ten per cent of $2,640, that being my 'current yearly pay' with five years service?"

The Paymaster-General, in forwarding this letter from Paymaster Mel to the department, makes no comment as to this question.

The point involved is the construction of the words "current yearly pay." This language is the same as that used in section 1262 of the Revised Statutes, which reads as follows:

"SEC. 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service."

In construing this section the Supreme Court, in the case of United States *v.* Tyler (105 U. S. Reports, p. 244), held:

"The words 'current yearly pay,' in section 1262, require that when the increased pay for any period of five years is to commence the ten per cent must be counted on the regular salary added to its increase by any previous periods of five years; so that the original salary of the rank, and any additions of 10 per cent previously earned for periods of five years, constitute the current yearly pay on which said 10 per cent is to be calculated."

In view of this clear interpretation by the Supreme Court of the words "current yearly pay" there does not appear to be any question as to the proper construction of the clause contained in the act of May 13, 1908, above quoted. "It is a general rule of interpretation that the legislature is presumed to know decisions of the courts construing its language, so that if the tribunals have given a certain construction and the legislature in a new

law uses the same or practically the same language, without negativing the construction adopted by the courts, it will be presumed that the legislature means what the courts have said." (Opinion of the Attorney-General, vol. 25, p. 309.) It is well settled that "words in a subsequent act are to be given the recognized meaning they had in a former act *in pari materia* in the absence of anything to show a contrary intent, and judicial decisions construing one of such acts form a sound rule of construction for the other." (A. & E. Ency. of Law, vol. 26, p. 611, and authorities there cited.)

In the present case Congress has used exactly the same language and there is nothing in the act of May 13, 1908, "negativing the construction adopted by the courts," nor is there anything in that act "to show a contrary intent."

The only possible doubt upon this question is caused by the fact that Congress, in an act approved June 30, 1882, inserted the following clause:

"*Provided*, That from and after the first day of July, 1882, the ten per centum increase for length of service allowed to certain officers by section 1262 of the Revised Statutes shall be computed on the yearly pay of the grade fixed by sections 1261 and 1274 of the Revised Statutes."

Upon consideration, the fact that Congress, after having changed the method of computing longevity pay by the above enactment, reverted to its former language in passing the act approved May 13, 1908, would seem to show only more clearly that it intended thereby to restore the previous method of computing such increased pay. The act of June 30, 1882, above quoted, does not purport to be a legislative construction of the words "current yearly pay," but, on the contrary, as plainly appears from its language, merely changes the method of computing the longevity increase by basing such increase upon the *grade pay* instead of the "current yearly pay," as provided by the previous law. This seems to be the view taken by the Supreme Court in construing the act of June 30, 1882, its decision apparently recognizing "current yearly pay" and "yearly pay of the grade" to be two entirely different things (United States *v.* Miller, 208

U. S., p. 32, 38). However, as bearing upon this question, the following is quoted:

"It is the duty of the legislature to enact laws, not to expound or interpret them. Yet while an expression of the legislative view as to the proper construction of another law is of no judicial force, it is nevertheless entitled to some weight in the construction of *doubtful* language. * * * Clause of the same character (known in England as 'interpretation clauses') are frequently added to single acts, and are confined to the interpretation of the acts to which they are attached." (A. & E. Ency. of Law, vol. 26, pp. 636, 637.)

Although this office entertains no doubt that the increased pay for length of service provided by the act of May 13, 1908, should be computed in the manner set forth in the decision of the Supreme Court in the Tyler case, above quoted it is recommended that the question be referred to the Comptroller of the Treasury, for the protection of pay officers and in order to avoid confusion which would result from disallowances by the auditor in the event of a contrary ruling after disbursements had been made.

Respectfully submitted.

E. H. CAMPBELL,
Judge-Advocate-General.

Office Supreme Court, U. S.
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CLERK.

IN THE

Supreme Court of the United States.

October Term, 1911.

GEORGE R. PLUMMER, *Appellant*,
v.
THE UNITED STATES. } No. 177.

APPEAL FROM THE COURT OF CLAIMS.

Brief on Behalf of some officers of the Navy Interested with Appellant in the Question of the Computation of Longevity Increases Under the Act of May 13, 1908.

HILARY A. HERBERT,
BENJAMIN MICOU,
RICHARD P. WHITELEY.

IN THE

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THE UNITED STATES. } No. 177.

APPEAL FROM THE COURT OF CLAIMS.

Brief on Behalf of some Officers of the Navy Interested with Appellant in the Question of the Computation of Longevity Increases Under the Act of May 13, 1908.

STATEMENT.

As counsel for certain officers of the Navy, we have a case now pending in the Court of Claims and not yet heard in which is solely involved the method of computing the 10 per cent increases for longevity pay under the pay provision of the act of May 13, 1908. That is one of the questions before this court in the above case, and by permission of the court first had we file a brief.

This brief we confine to the question in which our clients are interested, viz., the proper construction of the provision of the act of May 13, 1908, prescribing the method of computing the 10 per cent increases for longevity pay.

This provision is as follows:

> "There shall be allowed and paid to each commissioned officer below the rank of rear-admiral, ten per cent of his current yearly pay for each term of five years' service in the Army, Navy and Marine Corps. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law."

Our Contention.

We contend that "the current yearly pay" has the meaning given to those words by the Supreme Court in passing upon an act for the Army, passed in 1870. *United States* v. *Tyler*, 105 U. S. 244, 246.

In that case, construing identically a similar phrase, this court said:

> "We also hold that the words 'current yearly pay' in section 1262, require that, when the increased pay for any period of five years is to commence, the ten *per centum* must be counted on the regular salary added to its increase by any previous periods of five years; so that the original salary of the rank, and any additions of ten per cent previously earned for periods of five years, constitute the current yearly pay on which the said *ten per centum* is to be calculated."
>
> *United States* v. *Tyler*, 105 U. S. 244.)

The Government's Contention.

Appellee admits the judicial construction that has been placed upon this phrase to be what we claim, but endeavors to show that the words in this instance should be stripped of their ordinary and natural meaning, and of the meaning that the courts have given them, first, because of the passage of the act of Congress of June 30, 1882, changing the method of computing longevity increase for the Army from that of computing it on current yearly pay to computing it on yearly, or base, pay only. And, second, that because of a supposed intent on the part

of Congress by the increase pay legislation of 1908, to equalize Army and Navy pay, there should here be an exception to the elementary rule that the legislature has used language in the sense in which it has been previously construed by the courts.

I. The Act of June 30, 1882.

As to the effect of the act of June 30, 1882, counsel for the Government states:

> "It is true that this court, in the case of *United States* v. *Tyler* (105 U. S. 244), construed the words 'current yearly pay' in the same manner for which appellant now contends, but it is equally true that immediately after that decision Congress passed the amendatory act of June 30, 1882 (22 Stats. 118), which provided:
>
> "'That from and after the first day of July, eighteen hundred and eighty-two, the ten per centum for length of service allowed to certain officers by section twelve hundred and sixty-two of the Revised Statutes shall be computed on the yearly pay of the grade fixed by sections twelve hundred and sixty-one and twelve hundred and sixty-four of the Revised Statutes.'"
>
> (pp. 12–13, appellees' brief.)

Appellee also admits that—

> "The scope and effect of the amendatory act of 1882, *supra*, were construed by this court in the case of *United States* v. *Miller* (208 U. S. 37, 38) in the following terms:
>
> "'This statute was doubtless passed to prevent the computation of longevity pay by compounding previous pay for the purpose, which had the effect to give the increase on the pay of the grade and also on the previous longevity increase. This amendatory act distinctly limits the computation of increase pay for length of service to yearly pay of the grade or rank of the officer entitled thereto.'"
>
> (p. 13, brief.)

Before discussing the effect of the *Miller* case we would say that so far as computing longevity increases upon current yearly pay compounds previous pay, that as a practical question it gives but a small increase to the officers affected. There are four longevity increases which come at the end of each five years of an officer's first twenty years of service. At the end of the first five years, there having been no previous longevity, there is nothing to compound, because base pay and current yearly pay are the same. At the end of twenty years, the last of the four five-year periods, there is no compounding, because the act of 1908 provides:

> "The total amount of each increase for longevity of service shall in no case exceed forty per centum on the yearly pay of the grade, as provided by law."

The compounding, therefore, occurs only at the end of the tenth and fifteenth years of service. A midshipman is an officer the day he enters the Naval Academy. He does not become an ensign for six years. Therefore he has had over five years' service before he becomes an ensign. One of the purposes of the personnel act of 1899 was to remove what, in naval parlance, was designated "the hump," whereby the younger officers were held back from their promotions, and the act resulted in greatly accelerating promotions, so that now promotions are as rapid as they are likely to be. Under existing conditions an officer reaches his tenth year of service as ensign or lieutenant, junior grade, and his fifteenth year as lieutenant or lieutenant-commander.

For illustration, take the case of the more rapid promotion, that of an officer who reaches lieutenant, junior grade, in his tenth year, and lieutenant-commander in his fifteenth year, and such officer would receive by computing longevity on his current yearly pay as the statute calls

for, instead of on his base pay an increase of $20 per annum after ten years' service and $74.40 per annum after fifteen years' service.

LIEUTENANT—JUNIOR GRADE.

As at present allowed.	*Pay under construction claimed.*
$2,000 base pay in first 5 years.	$2,000 base pay in first 5 years.
200 10% of base pay.	200 10% of current yearly pay.
$2,200 pay after 5 years.	$2,200 pay after 5 years.
200 10% of base pay.	220 10% of current yearly pay.
$2,400 pay after 10 years.	$2,420 pay after 10 years.

A difference of $20 a year.

LIEUTENANT.

As at present allowed.	*Pay under construction claimed.*
$2,400 base pay in first 5 years.	$2,400 base pay in first 5 years.
240 10% of base pay.	240 10% of current yearly pay.
$2,640 pay after 5 years.	$2,640 pay after 5 years.
240 10% of base pay.	264 10% of current yearly pay.
$2,880 pay after 10 years.	$2,904 pay after 10 years.
240 10% of base pay.	290.40 10% of current yearly pay.
$3,120 pay after 15 years.	$3,194.40 pay after 15 years.

A difference $74.40 a year.

Should a lieutenant be promoted to lieutenant-commander before serving twenty years, computing in the same way, his pay under the construction for which we contend would be $3,993 per annum, instead of $3,900, a difference of $93 a year.

Because the compounding only affects an officer's pay on his 10th and 15th year increase, it does not affect the pay of officers above the grade of lieutenant-commander.

The wisdom of the provision is that this increase comes to the officer at an age when ordinarily his duties, if not the most responsible are the most arduous, and when if

he has a family his pay is less proportionate to his needs than at any other period of his service.

An examination of this *Miller* case shows merely that Congress changed from July 1, 1882, a future date to the enactment the basis for computing longevity increase from computing it upon current yearly pay to computing it upon "yearly pay" of the grade or rank of the officer concerned. Since changing this method of computation there has been no enactment of law for the Army that reverts to the 1870 basis. Consequently, since 1882 army officers have been paid their ten per cent longevity increases upon their yearly pay, as contra-distinguished from their current yearly pay. As the Supreme Court had under consideration in the *Miller* case the construction of the *amendment in 1882* to the law of 1870, it necessarily decided that the amendatory act limited from July 1, 1882, when it became effective, the basis for computation of increase pay to yearly pay, instead of current yearly pay. This court does not even hint that its previous construction of the meaning of "current yearly pay" was erroneous, but merely states the effect of the amendment of 1882, striking the word "current" out of the law of 1870. That is the extent of the decision in the *Miller* case, and it leaves unchanged the construction heretofore uniformly adopted by the courts of the phrase "current yearly pay."

The Judge-Advocate-General of the Navy July 1, 1908, construed the 1908 pay law, and after considering the effect of the passage of the act of June 30, 1882, stated:

> "The act of June 30, 1882, above quoted, does not purport to be a legislative construction of the words "current yearly pay," but, on the contrary, as plainly appears from its language, merely changes the method of computing the longevity increase by basing such increase upon the *grade pay* instead of the 'current yearly pay,' as provided by the previous

law. This seems to be the view taken by the Supreme Court in construing the act of June 30, 1882, its decision apparently recognizing 'current yearly pay' and 'yearly pay of the grade' to be two entirely different things. (*United States* v. *Miller*, 208 U. S. pp. 32, 38.)"

II. Not a Case for Exception to the Rule that the Legislature is Presumed to Have Used the Phrase "Current Yearly Pay" in the Sense the Courts Have Construed It.

Counsel for the appellee (p. 14, brief) recognizes the rule above referred to, then says of it (italics our own):

"But this, as all other rules, is subject always to the intention of the legislature, *expressed or implied in the statute, which, when doubtful,* may be determined from an examination of prior and contemporaneous acts, the reasons which induced its passage, and the purpose it was intended to accomplish" (p. 14 brief).

Now, there is certainly nothing doubtful, expressed or implied, in the statute which requires an examination of prior and contemporaneous acts to determine the reasons which induced the passage of this provision.

Furthermore, it will be seen that it is not prior and contemporaneous acts to which counsel requests the court to look for the reasons of this enactment, but to expressions of individual members of Congress of their views as to the general intent of this legislation.

While the intent of the legislature should be ascertained and determined by the court, it is equally true that in so doing the court should first look to the language used by the legislature, which, if plain, clear and unambiguous, is the best evidence of legislative intent, and renders it the duty of the court to give effect to this

language according to its plain and natural signification. If there be no inconsistency in the language used, no extraneous rules of construction can be resorted to either to extend or limit the plain meaning of the words employed.

> "Where the meaning of a statute is plain it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction. *Benton* v. *Wickwire*, 54 N. Y. 226; *Woodbury* v. *Berry*, 18 Ohio St. 456; *Bailey* v. *Mattingly*, 14 B. Mon. 89; *Ezekiel* v. *Dixon*, 3 Georgia 146; *Farrel Foundry* v. *Dare*, 26 Conn. 376; *Sussex Peerage Case*, 11 C. x Fin. 85, 143; Bishop on the Written Laws, p. 72."
>
> *Thornley* v. *United States*, 113 U. S. 310.
>
> *Mr. Justice* Woods, affirming decision of the Court of Claims.

> "Where clear words are used, to indicate the purpose, there is no necessity to resort to other aids. *Beale* v. *Harwood*, 2 H. & J. 167. * * *
>
> "Statutes should be interpreted according to the most natural and obvious import of their language, without resorting to subtle or forced construction, for the purpose of either *limiting* or *extending* their operation. Dwarris on Stat. 144. * * *
>
> "It is only in cases where the meaning of a statute is doubtful, that the courts are authorized to indulge in conjecture, as to the intention of the legislature, or to look to consequences in the construction of the law.
>
> "When the meaning is plain, the act must be carried into effect according to its language, or the courts would be assuming legislative authority. *Denn* v. *Reid*, 10 Peters, 524."
>
> *Cearfoss* v. *State*, 42 Md. 403.

See also—

> *Ohio Nat. Bank* v. *Berlin*, 26 App. (D. C.) 218; *Martin* v. *Martin, etc. Co.* 27 App. (D. C.) 59; *Lake County* v. *Rollins*, 130 U. S. 662;

Mr. Justice Lamar; *United States* v. *Goldenberg*, 168 U. S. 95; *Mr. Justice* Brewer.

In a case decided by the Supreme Court during the present term it is held that the words of a statute should be given their natural signification.

Southern Railway v. *United States*, decided October 30, 1911.

We think it is plain that there is no warrant, much less any occasion, to disregard the judicial construction that the court has put upon the phrase under consideration, but that every rule of construction demands that this court hold that Congress used these words in the sense in which they have been construed.

TYLER CASE CONTROLS CASE AT BAR.

In addition to the leading case of *United States* v. *Tyler*, 105 U. S. 244, we call attention to the following cases of the Supreme Court and the Court of Claims, following the Supreme Court's opinion in the *Tyler* case, and construing the words under consideration as we contend they should be construed in the case at bar:

"In the case of *United States* v. *Mills* (197 U. S. 223), involving the question as to what principal sum in the ten per cent. increase of compensation to officers in our island possessions authorized by the acts of May 26, 1900, and March 2, 1901 (31 Stat. 211, 903), should be computed upon, the court, in response to the contention of the Government that the term 'current yearly pay' mentioned in Section 1262 had a different meaning from the term 'pay proper' contained in said acts of May 26 and March 2, *supra*, said:

"'We do not think that there is any such material difference between the two expressions as in this case to demand their different constructions. "Cur-

rent yearly pay" and "pay proper," as used in the sections, mean the regular, ordinary pay which an officer may be entitled to under the facts in his case, and if, by virtue of length of service, he is entitled to receive the compensation, provided for in Section 1262, that compensation is his "pay," or his "pay proper," as distinguished from possible other compensation by any allowances, or commutation, or otherwise.'

"See also the case of *United States* v. *Tyler* (105 U. S. 244)."

Washington Bowie, Jr. v. *The United States*, 45 C. Cls. 46, 47, decided December 3, 1909.

"The method of computation adopted herein by the Court of Claims is the same as that adopted in *United States* v. *Tyler*, *supra*; that method has therefore received the approval of this court, or at least it has been held that the ten per centum of the current yearly pay is to be calculated upon the aggregate pay provided for in the two sections (1261 and 1262), and not merely upon the minimum pay granted by section 1261."

United States v. *Mills*, 197 U. S. 227, October term, 1904.

See also *Irwin* v. *United States*, 38 C. Cls. 102, where the court again refers to and follows the Supreme Court's decision in construing "current yearly pay."

And the decision of the Judge-Advocate-General of the Navy of July 1, 1908, to the effect that in the construction of the phrase under consideration in the 1908 Navy pay law, the *Tyler* decision is controlling.

These decisions definitely establish the fact that but one construction has ever been put by the courts upon the words "current yearly pay," and that that construction must be given here.

III. The Exception Invoked is not Properly Applied.

Counsel has asked this court to go far beyond what is permissible, where the intention of the legislature, expressed or implied, *in a statute is doubtful*, and to seek the intent not from prior and contemporaneous acts, but from expressions of individual members of the legislature and the motives assigned by them for supporting the measure.

Chief Justice Taney said:

> "In expounding this law the judgment of the court can not, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."
>
> *Aldridge et al.* v. *Williams*, 3 How. 24.

Also,

> "In construing an act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used."
>
> *United States* v. *Union Pacific R. R. Co.* 91 U. S. 72.

It is claimed that the phrase does not mean what it has uniformly been held by the courts to mean, because

of the construction placed by members of Congress, in course of consideration of the pending measure, not upon this phrase, but upon the general intent of the increased pay legislation for the Navy. Could this be shown from sources to which the court could properly look for intent, an intent so general would not vary the meaning of a plain unambiguous phrase that long before the passage of this act had been judicially determined to have a fixed, certain meaning. A general intent evidenced only by expressions of individual members, certainly would not vary the plain meaning of any language.

The framing of the legislation of 1908 by which the pay of the Army and Navy was increased shows, though, that counsel is mistaken in his contention (p. 15, brief):

> "That Congress intended by these two enactments to place all commissioned officers of the Army and Navy on an exact equality as to pay."

IV. Never the Intent of the Acts of May 11 and 13, 1908, to Exactly Equalize Army and Navy Pay.

1. To start where counsel for appellee does, with the personnel act of March 3, 1899, whatever the intention of that act might have been, it did not operate to put officers of the Army and Navy on an exact equality as to pay. It placed upon army pay when at sea the commissioned officers of the line, medical and pay corps. It left all other officers, including the commissioned officers of the construction and civil engineer corps, upon old navy pay; and the three classes of commissioned officers whose pay was based on army pay, namely, those of the line, medical and pay corps, had their pay reduced by the act fifteen per cent below that of army pay when on shore duty. All officers of the line even when at sea did not receive the same pay exactly as officers of corresponding

rank in the Army, *i. e.*, some of the officers of the old Engineer Corps. Such officers as members of that corps had received more pay than officers of corresponding rank in the line, and when they were legislated into the line this increase of pay was preserved to them by the provision of section 13, that nothing in the personnel act should operate to reduce the pay any officer was then getting.

These are sufficient instances to show, whatever may have been its intent, that the personnel act did not effect an exact equality of pay.

After the personnel act of 1899, it was claimed before Congress, as well as the courts, that there were many inequalities between the pay of the Army and the Navy, and Congress was being constantly appealed to to correct these inequalities.

This was the status when the question arose of increasing the pay of the two services, and the legislation passed to accomplish that end has done much to stop the constant urging of changes upon the Military and Naval Committees of Congress because officers of one or the other of the two services considered their pay did not correspond to that of officers of the same rank in the other service.

Congress made the pay of the two services entirely independent of each other, and put pay on the same general basis only in so far as the exigencies and differing duties of the two services justified it. An exact equalization was not attempted, and it was recognized that differing conditions in the two services could best be provided for by not basing the pay of one service on that of the other.

The question of increased pay for both the Army and Navy was first taken up in Congress by a bill introduced in both Houses, known as the Dick-Capron pay bill. This provided for an increased rate of pay for both services, placing the pay of the two services on exactly the

same basis. The bill was never reported out of Committees.

An increased pay bill for the Navy was reported favorably to the House, the idea of which was apparently to establish a standard or corresponding pay as nearly as possible, H. R. 17,527, 60th Congress, 1st Session. That bill contained this provision:

> "That hereafter the pay and allowances, except forage and mileage, which shall be governed by existing law, of all officers of the Navy and Marine Corps, shall be the same as the pay and allowances of officers of corresponding rank in the Army."

The bill was never voted on in the House, never introduced in the Senate, and never became a law.

It is from the House Naval Committee's report on this bill that counsel quotes on page 16 of his brief, to show that it was the intent of the legislation afterwards actually passed, to equalize the pay of the Army and Navy. What he quotes is:

> "Should this bill become a law the result will be to place all commissioned officers of the Army, Navy and Marine Corps on exactly the same basis as to pay," etc.

The army appropriation bill reached the Senate with no provision in it for increase of pay. The following provision was put in that bill by the Senate Committee on Military Affairs:

> "That the present pay of officers of the Army is hereby, and shall hereafter be, increased as follows: * * * Of lieutenant-generals, 5 per cent; of major-generals, 10 per cent; of brigadier-generals, 15 per cent; of colonels, lieutenant-colonels, and majors, 20 per cent; of captains, first lieutenants, and second lieutenants, 25 per cent; and the pay of cadets at the Military Academy is hereby, and shall

hereafter be, increased 25 per cent; *Provided*, That section 1267 of the Revised Statutes of the United States is hereby repealed: *Provided further*, That nothing in this section is intended to increase or change or shall be construed as increasing or changing the present pay or allowances of any officer in the United States Navy; and section 13 of an act entitled 'An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States,' approved March 3, 1899, shall not be construed as changing the pay of any naval officer by reason of the provisions of this act."

Cong. Rec. Vol. 42, Part 5, p. 4417.

Here was legislation proposed for the Army directly declared not to increase or change navy pay. The Senate passed the army bill with this provision in it. After it had so done the naval appropriation bill reached the Senate from the House and it had passed the House, like the army bill had done, without any provision whatever for increased pay. That matter was taken up in the Senate Naval Committee, but that Committee did not adopt the provisions of the bill that Mr. Foss had reported in the House, H. R. 17527, from which report counsel quotes (p. 16, brief).

The naval appropriation bill as unanimously reported from the Committee in the Senate contained the following provisions:

"The pay of all active and retired commissioned officers, warrant officers, midshipmen, and pay clerks in the Navy * * * is hereby increased twenty per cent."

Congressional Record, Vol. 42, Part 2, p. 5112.

This flat increase for all grades and all classes of officers, of twenty per cent, was entirely different from the percentage increase of the army bill which ranged all the way

from five to twenty-five per cent, based on rank. It is clear that the Senate Committee was not of the mind of the House Committee, and that the Senate was not, for it passed the naval bill with the flat twenty per cent provision the committee had reported.

When this provision of the naval bill was under consideration in the Senate, a colloquy ensued between the Chairmen of the Military and the Naval Committees, Mr. Warren and Mr. Hale, respectively. Senator Warren referred to the fact that it had been thought best to divide the question, and to take up the increase of pay for the Army in the Committee on Military Affairs and that of the Navy in the Committee on Naval Affairs, and had pointed out that the flat increase of twenty per cent for the Navy would give navy officers very much more than army officers, and asked if it was Senator Hale's expectation that he would be able to correct this in conference. Then followed:

> "Mr. HALE. After the bill goes to conference I shall not seek to push action in the conference until I see what is done with the Army, and I shall try to put the two as near as I can upon something near an equal basis. But I am afraid the conferees will have trouble enough in getting it put in. I do not know how much trouble the Senator will have with the other branch.
>
> "Mr. WARREN. I want to ask the Senator another question. In view of the fact that for many years the pay has been the same in the Army and the Navy for corresponding rank, I ask the Senator if it is his intention to change that comity between the two bodies.
>
> "Mr. HALE. It has always been claimed by the Navy that their pay should be rather more than that of the Army, because it is service that calls them away from home, and there are more hardships and more expenses. We have observed that in the provisions for the rank and file for the seamen of the

Navy. If the two bills go through, the enlisted men and petty officers in the Navy will receive some 10 or 15 per cent more than the Army, for the reason I have indicated. Whether that applies with the same force to the higher rank of officers I can not yet tell, but my mind is entirely open with regard to it. Considering this general proposition, I think the two services ought to be on as near the same basis as is possible, and I shall try to bring that about."

Congressional Record, Vol. 42, Part 6, pp. 5112–3.

After the army and navy bills were passed by the Senate, with entirely different increase pay provisions, and expressly providing that the pay of the one should not be based on the other, they each went to conference of separate committees; from thence the army bill came with the following provision:

"That hereafter the annual pay of officers of the Army of the several grades herein mentioned shall be as follows: major-general, eight thousand dollars; brigadier-general, six thousand dollars; colonel, four thousand dollars; lieutenant-colonel, three thousand five hundred dollars; major, three thousand dollars; captain, two thousand four hundred dollars; first lieutenant, two thousand dollars; second lieutenant, one thousand seven hundred dollars. And the pay of cadets at the Military Academy shall hereafter be six hundred dollars a year. That hereafter the United States shall furnish mounts and horse equipments for all officers of the Army below the grade of major required to be mounted, but in case any officer below the grade of major required to be mounted, provides himself with suitable mounts at his own expense, he shall receive an addition to his pay of one hundred and fifty dollars per annum if he provides one mount, and two hundred dollars per annum if he provides two mounts. Section twelve hundred and sixty-seven of the Revised Statutes of the United States is hereby amended to read as follows: 'In no case shall the pay of a

colonel exceed five thousand dollars a year; the pay of a lieutenant-colonel exceed four thousand five hundred dollars a year; or the pay of a major exceed four thousand dollars a year': *Provided*, That nothing in this section is intended to increase or change or shall be construed as increasing or changing the present pay or allowances of any officer in the United States Navy; and section thirteen of an act entitled 'An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States,' approved March third, eighteen hundred and ninety-nine, shall not be construed as changing the pay of any naval officer by reason of the provisions of this act."

And the navy bill came from conference with the following provision:

"Hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances according to rank and length of service, and the annual pay of each grade shall be as follows: For Admiral, thirteen thousand five hundred dollars; rear-admiral, first nine, eight thousand dollars; rear-admiral, second nine, or commodore, six thousand dollars; captain, four thousand dollars; commander, three thousand five hundred dollars; lieutenant-commander, three thousand dollars; lieutenant, two thousand four hundred dollars; lieutenant, junior grade, two thousand dollars; ensign, one thousand seven hundred dollars. There shall be allowed and paid to each commissioned officer below the rank of rear-admiral ten per centum of his current yearly pay for each term of five years service in the Army, Navy and Marine Corps. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law: *Provided*, That the annual pay of captain shall not exceed five thousand dollars per annum; of commander, four thousand five hundred dollars per annum; and of lieutenant-commander, four thousand dollars per

annum. All officers on sea duty and all officers on shore duty beyond the continental limits of the United States shall while so serving receive ten per centum additional of their salaries and increase as above provided, and such increase shall commence from the date of reporting for duty on board ship or the date of sailing from the United States for shore duty beyond the seas or to join a ship in foreign waters. The pay of midshipmen shall hereafter be six hundred dollars per annum while at the Naval Academy, and one thousand four hundred dollars per annum after graduation from the Naval Academy. The pay of all warrant officers and mates is hereby increased twenty-five per centum, and all paymasters' clerks shall, while on duty, receive the same pay and allowances as warrant officers of like length of service in the Navy."

and the two provisions afterwards each became a law in the respective bills of which they were part, as reported from conference.

When the House conference report was being considered, Mr. Foss, chairman of the House Naval Committee, made a statement on the floor of the House, quoted from, pp. 17–18, appellee's brief. If in that statement Mr. Foss overshot the mark, it only illustrates the wisdom of the rule laid down by Chief Justice Taney, which we have already quoted, that in explaining a law the judgment of the court can not in any degree be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing it. In the more guarded statement of the managers (Mr. Foss being senior manager on the part of the House) accompanying the conference report, the following statement occurs:

"This amendment places the pay of the Navy on the same basis as the army pay, *or as near as it is*

possible to do so, as provided in the bill, H. R. 17287, as amended by the Senate and agreed to in conference by both Houses, making appropriation for the support of the Army for the fiscal year ending June 30, 1909."

H. Rep. 1639, 60th Cong., 1st Session, p. 7.

Here was recognized that it had been impossible to put the Army and Navy on an exact equality as to pay. Exact equality was not claimed.

It is interesting to note how this expression of the House managers of the meaning of the amendment, which afterwards became a law, tallies with just what Senator Hale had stated in open Senate he would try to bring about. Senator Hale after pointing out that it had always been claimed that navy pay should be rather more than army pay, giving the reason for this claim, and followed by the statement that this claim had been observed for the rank and file, then said:

"Considering this general proposition, I think the two services ought to be on as near the same basis as possible, and I shall try to bring that about."

Now what Congress actually did was to put the pay of the two services on near the same basis, giving as a general proposition the Navy rather more pay than the Army.

For instance, under the personnel act the pay of some of the officers of the line and the officers of the Medical and Pay Corps when at sea had been made to correspond to the pay of officers of corresponding rank in the Army when on shore, though when such naval officers were on shore duty they received 15 per cent less than officers of corresponding rank in the Army.

Now by the act of 1908, besides as affected by computing longevity increase on current yearly pay, naval officers of certain grades receive, on duty ashore, the same as

army officers of corresponding rank on duty ashore; but for their natural, normal duty, which is afloat, they get ten per cent more than do army officers for their natural, normal duty, which is duty ashore.

To state it differently, under the personnel act certain officers of the Army and Navy, each for their normal duty ashore and afloat, respectively, received the same pay according to rank, while by the act of 1908 the Navy is given ten per cent more for normal duty than the Army; and for duty ashore the same that the Army gets for normal duty.

This refutes the contention of appellee that a comparison of the pay provisions of the two acts of 1908 discloses an exact assimilation of rank between the entire commissioned personnel of the two services, from major-general and rear-admiral to second lieutenant and ensign.

Other differences in pay could also be cited. For instance, differences between the Army and Navy arise out of the provision for the Navy that

> "nothing herein shall be considered to reduce the pay or allowances now authorized by law for any officer of the Navy."

But what is instanced above suffices to show not only that there was never prescribed, but when all done and said is looked at, that there was never intended to be prescribed, in the increased pay legislation for the Army and Navy an exact equality of pay between the two services.

V. Beneficial Statutes Should be Liberally Construed.

This is a provision prescribing compensation for officers and is subject to the well-recognized rule that beneficial statutes are to be construed liberally and in favor of the

beneficiaries; and if there were any doubt as to the meaning of the words "current yearly pay" (which there certainly can not be under the judicial construction that has already been placed on them), that doubt should be resolved in favor of the officers.

The following is the well-established rule, even in cases where language is loose and obscure, which it is not here:

> "Where the words of a statute prescribing compensation to a public officer are loose and obscure and admit of two interpretations, they should be construed in favor of the officer."
>
> Sutherland on Statutory Construction, Sec. 419.
>
> See also, *United States* v. *Morse*, 3 Story, 87.

Respectfully submitted,

HILARY A. HERBERT,

BENJAMIN MICOU,

RICHARD P. WHITELEY.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

GEORGE R. PLUMMER, APPELLANT,
v.
THE UNITED STATES.
No. 177.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appellant, George R. Plummer, was appointed July 1, 1903, an *acting* assistant surgeon in the temporary service of the Navy; reappointed July 1, 1906, and served as such until June 30, 1909. The appointments were made by the President under authority of a statute which provided that such appointees should have the rank and compensation of assistant surgeons. After the enactment of that statute Congress passed an act commonly known as the Navy personnel act of March 3, 1899 (30 Stats., 1004) (and subsequently the act of May 13, 1908, 35 Stats., 127), which changed the rank and increased the compensation of assistant surgeons, but made no reference to acting assistant surgeons appointed for temporary service.

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The appellant was paid, and accepted without objection, so far as the record discloses, during the whole period of his service, the compensation provided for assistant surgeons at the date of the passage of the act of 1898, under which his two appointments were made.

Upon the completion of his service on June 30, 1909, the appellant began this action in the Court of Claims, contending that as the compensation of assistant surgeons in the regular service had been increased by the Navy personnel act and the act of 1908, *supra,* it necessarily followed that the compensation of *acting* assistant surgeons, even though appointed for temporary service, had likewise been similarly increased, and that he was, therefore, entitled to judgment for a difference in pay for the whole period of his service, amounting to the sum of $4,236.52.

The Court of Claims held that the changes provided by the two later acts applied only to officers in the permanent service of the Navy, and dismissed the petition, whereupon the claimant appealed to this court.

ARGUMENT.

The act of May 4, 1898 (30 Stats., 380), under which the appellant was appointed, provides in part:

> That section thirteen hundred and seventy of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

"No person shall be appointed assistant surgeon until he has been examined and approved by a board of naval surgeons designated by the Secretary of the Navy, nor who is under twenty-one or over thirty years of age, inclusive.

"The President is hereby authorized to appoint for temporary service twenty-five acting assistant surgeons, who shall have the relative rank and compensation of assistant surgeons."

I.

The first error alleged, as a basis for this appeal, is the refusal of the court below to construe the phrase in the act of 1898 awarding *acting* assistant surgeons "the relative rank and compensation of assistant surgeons" to mean not merely that such temporary appointees should have the same rank and compensation as assistant surgeons at that time possessed, but further that *acting* assistant surgeons should have the same relative rank and compensation as might at any and all times thereafter be allowed to assistant surgeons.

The objection to this construction is found not merely in the fact that it rests upon a single phrase, segregated from the body of the whole enactment, but that it also wholly ignores the manifest intent and purpose of the enactment itself, which, as declared in express terms, authorized the President to appoint for temporary service only a limited number of surgeons who were not required to pos-

sess the qualifications prescribed by law for officers in the Medical Corps of the Navy.

It seems quite manifest, therefore, that in providing that such temporary appointees should have the rank and compensation of assistant surgeons Congress did not have in mind the rank and compensation which might at any and all times thereafter be granted to assistant surgeons in the permanent service of the Navy, but only the relative rank and compensation which the latter were receiving at the date of the approval of the act under which the temporary employment of acting assistant surgeons was authorized. In other words, it can not be assumed from the pay provision of the act of 1898, which it will be observed contains no words or phrase of anticipation, that Congress intended to prescribe a rule for the future and thereby to disable itself from increasing the rank and pay of officers in the permanent service, without increasing to the same extent the pay of the limited number of officers thus temporarily employed. (*United States* v. *Thomas,* 195 U. S., 418, 421.)

It is true that in the case of *United States* v. *Farenholt* (206 U. S., 226) this court, in construing the act of June 7, 1900 (31 Stats., 697), providing that assistant surgeons in the Navy should rank with assistant surgeons in the Army, construed the words "assistant surgeons" as descriptive of the whole class of assistant surgeons, passed as well as not passed. That case, however, related

exclusively to the question of rank and pay of medical officers in the regular service of the Navy, which is therefore clearly distinguishable from the issue involved in the case at bar.

II.

The provisions of the Navy personnel act do not apply to an acting assistant surgeon appointed for temporary service in the Navy.

Next it is insisted that whether the meaning of the act of 1898 be as appellant contends or not the judgment herein must nevertheless be reversed, because the appellant was during the period of his temporary service a commissioned officer of the Medical Corps of the Navy and therefore entitled to the same pay and allowances as an officer of rank corresponding to his own in the Army, together with five years' constructive credit granted to those appointed to the Navy from civil life, by section 13 of the so-called Navy personnel act, the material portions of which are as follows (30 Stats., 1007):

> That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army.
>
> * * * * *
>
> *Provided further,* That naval chaplains, who do not possess relative rank, shall have the rank of lieutenant in the Navy; and that

> all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited, for computing their pay, with five years' service.
>
> * * * * *

In the case of *Taylor* v. *United States* (38 C. Cls., 155) the Court of Claims had occasion to consider and reject in the following terms the same contention, advanced by the same counsel, on behalf of an acting assistant surgeon similarly appointed:

> In the act of March 3, 1899, we fail to find any express provision applying to officers of the Navy in the temporary service. That was "An act to reorganize and increase the efficiency of the personnel of the Navy and the Marine Corps of the United States," evidently referring to the officers of the Regular Navy, as it certainly could not be contended that the Congress had in view the reorganization of the officers in the temporary service, or that by that act they intended to incorporate them into the permanent service. On the contrary, it was not until the act of July 7, 1900, that provision was made for continuing them in the service by permanent commissions. Those who received commissions in the permanent service prior to that act did so presumably after a proper examination and approval by the board of naval surgeons designated by the Secretary of the Navy under the act of May 4, 1898.

And in the case of *Nelson* v. *United States* (43 C. Cls., 157–162), where the same contention was

again urged, the court, speaking through the Chief Justice, said:

> The question here was involved in the *Taylor case* (38 C. Cls. R., 155), and the ruling in that case was against the claimant on the ground that the act of March 3, 1899, had no application to officers of the Navy in the temporary service, and that therefore the claimant was not entitled to credit for the constructive service therein provided for. We see no reason to change the ruling in that case or the reasoning by which that ruling was reached.

The propriety of a reference to the title of an act to assist in determining the intent and meaning of the legislature is sustained by repeated decisions of this court. (*Holy Trinity Church* v. *United States*, 143 U. S., 462; *Price* v. *Forest*, 173 U. S., 427.)

The court delivered no opinion in the case at bar, but adhering to its former decisions held as a conclusion of law, upon the authority of the *Taylor* and *Nelson* cases, *supra*, that appellant was not entitled to recover and dismissed the petition.

Appellant's contention opposed to the letter of the personnel act.

That the conclusion thus reached is in strict accord with the letter of the personnel act appears to be clearly established by the previous legislation relating to commissioned officers of the Medical Corps of the Navy.

At the date of the passage of the last-named act the composition, manner of appointment, and qualifications prescribed by law for the active list of the Medical Corps of the Navy were as follows:

Act of August 5, 1882 (1 Supp. R. S., 376):

> That the active list of the Medical Corps of the Navy shall hereafter consist of fifteen medical directors, fifteen medical inspectors, fifty surgeons and ninety assistant and passed assistant surgeons.

Section 1369, Revised Statutes:

> All appointments in the Medical Corps shall be made by the President by and with the advice and consent of the Senate.

The act of May 4, 1898 (30 Stats., 380), under which the appellant was appointed, provides:

> That section thirteen hundred and seventy of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:
>
> "No person shall be appointed assistant surgeon until he has been examined and approved by a board of naval surgeons designated by the Secretary of the Navy, nor who is under twenty-one or over thirty years of age, inclusive."
>
> The President is hereby authorized to appoint for temporary service twenty-five acting assistant surgeons, who shall have the relative rank and conpensation of assistant surgeons.

Viewed in the light of those enactments it seems clear, beyond reasonable doubt, that Congress used the phrase "commissioned officers of the Medical

Corps" in the personnel act in the sense in which that term was used in the laws then in force for the Medical Corps, and that it did not intend the phrase as descriptive of a limited number of appointed officers temporarily employed under a special provision of law. The distinction drawn by the act of 1898 between these two classes of medical officers and the intention of Congress as shown by the Navy personnel act not to incorporate those temporarily employed into the permanent service is further emphasized by the act of June 7, 1900 (31 Stats., 697), in which provision was first made for continuing acting assistant surgeons in the permanent service in the following terms:

> The active list of surgeons shall hereafter consist of fifty-five, and that of passed assistant and assistant surgeons of one hundred and ten. Assistant surgeons shall rank with assistant surgeons in the Army: *Provided,* That the assistant surgeons under the age of fifty years appointed for temporary service during the War with Spain, having creditable records, who are now in the Navy may be given permanent commissions.

Appellant's construction equally opposed to the spirit of the personnel act.

It is equally clear that appellant's construction is likewise wholly opposed to the spirit of the personnel act. The third proviso to section 13 of that act directs that all officers, including warrant officers appointed to the Navy from civil life, shall on date

of appointment be credited, for purposes of computing their pay, with five years service, and it is therefore insisted that appellant should have been credited with that sum from the date of his appointment. The incongruity of this contention will be readily perceived when it is recalled that the appellant was appointed for a period of only three years and yet if his contention be correct he became entitled immediately upon accepting his appointment to a credit for constructive service of five years, or almost double the whole time for which he was actually appointed. Such a result clearly could not have been intended by Congress.

Circular issued by Navy Department.

Much emphasis is laid by the appellant (Brief, pp. 20–22) upon the statements contained in a circular, dated December 29, 1902, issued by authority of the Secretary of the Navy, inviting applications for appointment as acting assistant surgeons (Finding I, Rec., p. 4), which, it is insisted, constituted a promise on the part of the Government as to their rate of pay, and by which "the Government is bound by a species of equitable estoppel not to shift the ground and insist that a mistake was committed in the offer of compensation by its authorized officer." (Brief, p. 21.)

It is only necessary in answer to this somewhat novel proposition to invite attention to the fact that the law under which the appellant was appointed had been authoritatively and definitely construed

by the Court of Claims in the case of *Taylor* v. *United States* (*supra*), on January 5, 1903, or six months before the appellant accepted his first appointment, and he was of course charged not merely with full notice of the scope and effect of that decision, but also knowledge of the compensation he would be entitled to receive under the law as therein construed.

As said by this court in *United States* v. *Symonds* (120 U. S., 49):

> The authority of the Secretary to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court.

III.

Mode of computation of Navy pay under act of May 13, 1908 (35 Stat., 125).

Should the judgment be affirmed upon the main question, it will not be necessary for the court to consider the subject of computation of Navy pay under the act of 1908, *supra*, which, however, is not "a subordinate question," as stated by counsel, but,

on the contrary, is a question of the utmost importance, since it directly affects the mode of computing the pay of every commissioned and warrant officer in the Navy.

The act of 1908, *supra*, in part provides (p. 128):

> There shall be allowed and paid to each commissioned officer below the rank of rear admiral ten per centum of his current yearly pay for each term of five years' service in the Army, Navy, and Marine Corps. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law.

The question involved is whether the words "current yearly pay" require the longevity increase thus provided to be computed upon the base pay of the officer, with all prior increases for length of service added thereto, or whether the computation should be made solely on the base pay of the officer and all prior increases excluded therefrom.

It is true that this court, in the case of *United States* v. *Tyler* (105 U. S., 244), construed the words "current yearly pay" in the manner for which appellant now contends, but it is equally true that immediately after that decision Congress passed the amendatory act of June 30, 1882 (22 Stats., 118), which provided:

> That from and after the first day of July, eighteen hundred and eighty-two, the ten per centum increase for length of service al-

> lowed to certain officers by section twelve hundred and sixty-two of the Revised Statutes shall be computed on the yearly pay of the grade fixed by sections twelve hundred and sixty-one and twelve hundred and sixty-four of the Revised Statutes.

In accordance with the terms of this enactment, longevity increases for all officers of the Army have, since July 1, 1882, been uniformly computed on the yearly pay of the grade and not on the "current yearly pay," as provided by the former act.

The scope and effect of the amendatory act of 1882, *supra*, were construed by this court in the case of *United States* v. *Miller* (208 U. S., 37, 38) in the following terms:

> This statute was doubtless passed to prevent the computation of longevity pay by compounding previous pay for that purpose, which had the effect to give the increase on the pay of the grade and also on the previous longevity increase. This amendatory act distinctly limits the computation of increase pay for length of service to yearly pay of the grade or rank of the officer entitled thereto.

Appellant contends, however, notwithstanding the limitation thus expressly imposed upon the allowance of longevity pay to officers of the Army, that Congress having employed the words "current yearly pay" in the Navy act of 1908 it follows as a matter of course that it used them in the sense in which they had been construed in the *Tyler* case, *supra*, namely, as authorizing the computation of

longevity pay for the Navy by a method expressly forbidden for the Army thirty years ago.

In other words, appellant contends that Congress has prescribed one rule for the computation of longevity pay for the Army and another and different rule for its computation for the Navy, thereby increasing the pay of officers of the Navy over that provided for officers of the Army. Such a contention is so obviously and completely opposed both to the letter and spirit of all recent legislation pertaining to the pay of the Army and Navy as to merit but brief discussion. It is of course an elementary rule of statutory construction that where the legislature uses words in an enactment which have been judicially construed it is presumed to have used them in the sense in which the words have been thus construed. But this, like all other rules, is subject always to the intention of the legislature expressed or implied in the statute, which, when doubtful, may be determined from an examination of prior and contemporaneous acts, the reasons which induced its passage, and the purpose it was intended to accomplish.

Applying this latter principle to the construction of the words of act of 1908 the question involved admits of ready solution.

It is well settled that the personnel act was passed in 1899 for the express purpose of equalizing "the pay of naval officers (theretofore generally below that of officers of corresponding rank

in the Army) with that of officers of the Army of equal rank," and that Congress intended to make the act prospective in its application to future legislation. *United States* v. *Thomas* (195 U. S., 420).

Under and by virtue of the assimilating clause of its thirteenth section, the provisions of the Army longevity act were for the first time extended to the three classes of naval officers therein named, and thereafter commissioned officers of the line and of the Medical and Pay Corps of the Navy were allowed and paid increases for longevity service in precisely the same manner and to the same extent as allowed to officers of the Army under the Army law.

After an interval of ten years Congress decided to increase the pay of both the Army and Navy, but to do so by separate, though similar, enactments, which resulted in the passage of the Army act of May 11, 1908 (35 Stats., 106), and two days later, of the Navy act on May 13, 1908 (ib., 127).

That Congress intended by these two enactments to place all commissioned officers of the Army and Navy on an exact equality as to pay and allowances and thereby to remove the discrimination existing under the personnel act in favor of officers of the line and of the Medical and Pay Corps of the Navy, appears to be clearly established.

1. A comparison of the pay provisions of the two acts discloses an exact assimilation of rank

between the entire commissioned personnel of the two services from major general and rear admiral, to second lieutenant and ensign (35 Stats., 108, ib., p. 127).

2. By the following report of the House Committee on Naval Affairs on the bill which formed the basis of this legislation, to which reference is made on authority of *Binns* v. *United States* (194 U. S., 486), it was explained that—

> Should this bill become a law, the result will be to place all commissioned officers of the Army, Navy, and Marine Corps on exactly the same basis as to pay, thus removing the feeling that there is a discrimination in favor of one service over another, or in favor of one corps over another in the same service. (H. Rept. 1224, 60th Cong., 1st sess., p. 7.)

3. By the following "statement of managers on the part of the House," accompanying the conference report on the Navy bill, which was subsequently adopted, it was further explained that—

> This amendment places the pay of the Navy on the same basis as the Army pay or as near as it is possible to do so, as provided in the bill (H. R. 17288) as amended by the Senate and agreed to in conference by both Houses making appropriation for the support of the Army for the fiscal year ending June 30, 1909. * * * It likewise provides for a 10 per cent increase for all

officers on sea duty and all officers on shore duty beyond the continental limits of the United States. This provides for the officers of the Navy the same additional pay as enjoyed by officers of the Army when performing similar duty. (H. Rept. 1639, 60th Cong., 1st sess., p. 7.)

4. And finally, in a statement made by the chairman of the House Naval Committee immediately preceding the vote by which the conference report was adopted, the same intention was stated in the following even more emphatic terms:

> Mr. Foss. Now, there is another thing I want to say here, that we have not put a single provision in this bill that gives the Navy one penny more than the Army, not one single dollar. We have increased the officers just the same as the Army conferees increased it in the Army bill. The conferees on the naval bill waited for the action of the House the other day. We would not consider the increased pay of the officers until after the action of the House on the Army bill, and then we took the provisions of the Army bill and wrote them in the naval bill, and if there is a man here who says that we did more for the Navy than was done for the Army, let him stand up and say so now.
>
> * * * * * * * * Now, in view of the fact that we are equalizing the pay of the Navy and the Army, and it is an equalization, and I stand here to say it is nothing more than equalizing the two, I ask this House to stand by the

> conferees and adopt this report. Mr. Speaker, I call for a vote. (Cong. Rec., vol. 42, pt. 7, p. 6163; see also Cong. Rec., vol. 42, 60th Cong., 1st sess., pt. 5, p. 4674; ib., pt. 6, pp. 5112–5113.)

In view, therefore, of the established and recognized policy of Congress, to place officers of the Army and Navy of corresponding rank on the same footing as to pay and allowances, considered in connection with the terms of the two latest enactments, and the legislative history surrounding their adoption, we think the conclusion is irresistible that the phrase "current yearly pay" was inadvertently used by the framers of the Navy act. It is as incredible to believe that Congress intended by the use of that phrase to authorize a return to a method for computing longevity pay for officers of the Navy which it had discarded more than twenty-five years before for officers of the Army, as it is unreasonable to suppose that Congress thereby intended to prescribe one rate of longevity pay for the Army and a different and higher rate for the Navy.

We submit that the judgment of the Court of Claims dismissing the petition was correct, and that it should be affirmed.

JOHN Q. THOMPSON,
Assistant Attorney General.
FREDERICK DE C. FAUST,
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PLUMMER *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 177. Argued February 29, March 1, 1912.—Decided April 1, 1912.

Under § 13 of the Navy Personnel Act of March 3, 1899, 30 Stat. 1007, c. 413, and the acts of June 7, 1900, 31 Stat. 697, c. 859, March 2, 1907, 34 Stat. 1167, c. 2511, and May 13, 1908, 35 Stat. 127, c. 166, the pay of acting assistant surgeons was enhanced and assimilated to that of assistant surgeons in the Army, and did not remain fixed as regulated by § 1556, Rev. Stat.

Where an act of Congress, such as the Navy Personnel Act of 1899, provides for a standard by which to determine rank and pay of officers, it will not be presumed that Congress intended to create an inequality of compensation while leaving unmodified equality of rank and duty, and so held as to the provisions for pay of assistant surgeons and acting assistant surgeons in the Navy.

The construction of the statutes involved in this case is the contemporaneous construction given thereto by the Executive Department charged with execution of the provisions thereof.

Longevity pay of officers of the Army and Navy under the act of May 13, 1908, 35 Stat. 127, c. 166, is computed on the sum of the base pay and not the base pay and previous increases thereof.

Where Congress, after a decision of this court construing a certain expression used in a statute, passes a statute declaring that those

words shall be construed as having a definite meaning different from that given by this court, that expression, when used in a later statute on the same subject, will be presumed to have the meaning so given to it by Congress and not that previously given by this court.

Congress having by the act of June 30, 1882, 22 Stat. 118, c. 254, expressly provided that the current yearly pay on which longevity pay of officers of the Army and Navy is to be computed is base pay, and not base pay and increases, so as to overcome the construction given to the words "current yearly pay" by this court in *United States* v. *Tyler*, 105 U. S. 44, those words will be construed in the same manner when used in the subsequent act of May 13, 1908, 35 Stat. 125, c. 166, and not as construed in *United States* v. *Tyler*.

45 Ct. Cl. 614, reversed.

THE facts, which involve the construction of the provisions of acts of Congress relating to pay of acting assistant surgeons in the Navy, are stated in the opinion.

Mr. George A. King, with whom *Mr. William B. King*, *Mr. William E. Harvey* and *Mr. Archibald King*, were on the brief, for appellant.

Mr. Frederick De Courcey Faust, with whom *Mr. Assistant Attorney General John Q. Thompson* was on the brief, for the United States.

Mr. Hilary A. Herbert, *Mr. Benjamin Micou* and *Mr. Richard P. Whiteley* filed a brief on behalf of certain officers of the Navy.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This appeal is from a judgment of the Court of Claims denying the right to recover from the United States an alleged balance of compensation claimed to be due for services rendered as an acting assistant surgeon, at the Naval Station, Key West, Florida, from July 1, 1903, to July 1, 1909.

By an act approved May 4, 1898, 30 Stat. 369, 380, c. 234, the President was authorized "to appoint for temporary service twenty-five acting assistant surgeons, who shall have the relative rank and compensation of assistant surgeons. When the act of 1898 was passed the pay of officers in the naval service was generally regulated by § 1556, Rev. Stat., and the pay of an assistant surgeon for shore duty was fixed at $1,400 a year. By § 13 of the Naval Personnel Act of March 3, 1899, 30 Stat. 1004, 1007, c. 413, it was provided that commissioned officers of the line of the Navy and of the Medical and Pay Corps "shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law, for the officers of corresponding rank in the Army;" and in a proviso it was declared "That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty." The effect of this act was to increase the pay of naval officers generally, and therefore to enhance the pay of assistant surgeons.

The act of June 7, 1900, 31 Stat. 697, c. 859, raised the rank of assistant surgeons in the Navy by providing that "Assistant Surgeons shall rank with Assistant Surgeons in the Army." We say that this act raised the rank of assistant surgeons in the Navy for the following reasons: Prior to that act the rank of assistant surgeon in the Navy upon entrance into the service was that of ensign. (Rev. Stat., § 1474.) As by Rev. Stat., § 1168, the lowest rank of an assistant surgeon in the Army during the first three years of service was that of a lieutenant of cavalry, the effect of the act of 1900 was therefore to give to assistant surgeons in the Navy a higher rank, that is, to raise them from the rank of ensign to that of lieutenant, junior grade.

On December 29, 1902, the Surgeon General of the Navy published a circular soliciting applications for appointment "as acting assistant surgeons for three years

of service," and in the circular, among other things, it was stated as follows:

"The Secretary of the Navy, in order to meet the exigencies of the service, has authorized the appointment of 25 acting assistant surgeons for three years' service, to have the same rank and pay as assistant surgeons in the regular service.

The pay is as follows:

At sea	$1,650.00	a year.
On shore, with quarters	1,402.50	"
On shore, without quarters	1,690.50	" "

Plummer applied for appointment, and was commissioned by the President as an acting assistant surgeon in the naval service, to serve for three years from July 1, 1903. After the expiration of the first appointment he was reappointed for another term of three years, and his commission under the first and second appointment stated his rank to be that of lieutenant, junior grade.

During Plummer's second three year period of service two acts were passed which it is claimed enhanced the compensation of assistant surgeons, viz.: An act approved March 2, 1907, 34 Stat. 1158, 1167, c. 2511, and an act approved May 13, 1908, 35 Stat. 127, 128, c. 166. By the act of 1907 assistant surgeons were allowed heat and light for quarters and commutation for the same. By the act of 1908, the pay of a lieutenant, junior grade, the relative rank of an assistant surgeon, was fixed at $2,000.

During the term of both services Plummer was paid not at the rate provided by law for the pay of assistant surgeons at the time his services as acting assistant surgeon were rendered, but at the rate of pay which was fixed for assistant surgeons at the time the act of 1898 was passed. That is to say, despite the change in rank and pay of assistant surgeons in the Navy brought about by the legislation subsequent to 1898, Plummer was paid

upon the theory that those changes had no effect upon the pay of acting assistant surgeons, and therefore they were entitled only to the sum which was allowed by law (Rev. Stat., § 1556) at the time the appointment of acting assistant surgeons was provided for.

By an express finding of the court below, as to which there is no dispute, if Plummer had been paid at the rate fixed by law for assistant surgeons at the time his services as acting assistant surgeon were rendered he would have been entitled, irrespective of the question of longevity pay as to which there is dispute, to $1,814.78 more pay than he received; to $2,007.20, as commutation of quarters, and to $341.88 for heat and light for quarters under the act of March 2, 1907, in all $4,213.86. Whether, therefore, an acting assistant surgeon under the legislation to which we have referred was entitled to be paid as his services were performed at the rate then fixed by law as the pay and allowance of an assistant surgeon, and what was the proper basis for the calculation of longevity pay, are the two questions requiring solution.

The court below based its conclusion that the acting assistant surgeon was only entitled to the pay which was allowed assistant surgeons at the time of the passage of the act authorizing the appointment of acting assistant surgeons, and, hence, that acting assistant surgeons got no benefit from subsequent increases of the pay of assistant surgeons, upon two previous decisions to that effect—James S. Taylor (38 Ct. Cl. 155), and Hugh T. Nelson (41 *Ibid.* 157).

The reasoning of the court was thus expressed in the *Taylor Case* (p. 161):

"In the act of March 3, 1899, we fail to find any express provision applying to officers of the Navy in the temporary service. That was 'An act to reorganize and increase the efficiency of the personnel of the Navy and the Marine Corps of the United States,' evidently referring

to the officers of the Regular Navy, as it certainly could not be contended that the Congress had in view the reorganization of the officers in the temporary service, or that by that act they intended to incorporate them into the permanent service. On the contrary, it was not until the act of June 7, 1900, that provision was made for continuing them in the service by permanent commissions. Those who received commissions in the permanent service prior to that act did so presumably after a proper examination and approval by the board of naval surgeons designated by the Secretary of the Navy under the act of May 4, 1898."

But conceding the correctness of the premise upon which the reasoning just quoted rests—that is, the purpose of the Naval Personnel Act to deal with the standard of pay of the regular naval establishment—we think it is not conclusive or even in any degree persuasive of the question here for decision, which is not what was the purpose of Congress in fixing a standard for the pay of the regular naval establishment, but whether that standard as fixed must be resorted to for the purpose of determining the pay of acting assistant surgeons. The solution of that question must primarily be found within the text of the act of 1898, and as that text expressly gives to the acting assistant surgeons whose appointment it provides for the relative rank and compensation allowed by law to assistant surgeons, it must follow that in the absence of an express provision or a necessary implication to the contrary in the statute fixing the pay of assistant surgeons such standard became the measure by which the pay of the officers provided for in the act of 1898 was to be ascertained and allowed. In other words, as the act of 1898 provided for a standard by which to determine the rank and pay of the acting assistant surgeons—that is, the rank and compensation allowed assistant surgeons—in the nature of things it provided not for the application

of a non-existing or obsolete standard, but for an existing standard—that is, the rank and pay in force at the time when the services of the acting assistant surgeons were rendered. Looked at from a broader point of view—that is, testing the subject from a consideration of the obvious intent and purpose of the act of 1898—the same conclusion becomes necessary. It may not be doubted that the relation which the act of 1898 established between the rank and pay of acting assistant surgeons and assistant surgeons in reason must rest upon the substantial identity of the services to be rendered by the incumbents of both offices. This being true, it of course necessarily also is true that a mere increase of the compensation of assistant surgeons without any change between the duties of those officers and the duties of acting assistant surgeons cannot justify the implication unless there was a clear manifestation of the purpose to do so—that it was the intention of Congress to create an inequality of compensation while leaving unmodified equality of rank and duty.

That the view which we take of the act of 1898 was also the contemporaneous administrative construction given to the act plainly results from the circular of the Surgeon General under which Plummer was appointed, since the pay stated in that circular was not that fixed in § 1556, Rev. Stat., but was the sum fixed as the pay of assistant surgeons in the Navy at the time the circular was issued. Indeed that such also must have been the view entertained by the President when Plummer was commissioned obviously is shown by the fact that Plummer was commissioned as a lieutenant, junior grade, the rank of an assistant surgeon at the time of his appointment, and not as an ensign, the rank accorded to assistant surgeons at the time when the act of 1898 was adopted.

The controversy as to the sum of the longevity pay arises from a portion of the text of the act of May 13, 1908, 35 Stat. 127, 128, c. 166, reading as follows:

"There shall be allowed and paid to each commissioned officer below the rank of rear admiral ten per centum of his current yearly pay for each term of five years' service in the Army, Navy, and Marine Corps. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law."

It is insisted that as the words "current yearly pay," as employed in Rev. Stat., § 1262, were construed in *United States* v. *Tyler*, 105 U. S. 244, to require that the calculation of the longevity pay should be made, not upon the sum of the base pay, but on the base pay and previous increases thereof, that the same rule must be applied to the words as used in the provision of the statute above quoted. But, subsequent to the *Tyler Case*, by the act of June 30, 1882, 22 Stat. 118, c. 254, Congress expressly directed that the ten per cent longevity increase provided for in § 1262, Rev. Stat., should be "computed on the yearly pay of the grade. . . ." That this act was passed for the express purpose of commanding a method of computation which would render inapplicable the construction adopted in the *Tyler Case* is not open to controversy. *United States* v. *Miller*, 208 U. S. 32, 38. Indeed, that from the date of the act of 1882 down to the present time the longevity pay of Army officers has been computed by the method directed by the act of 1882 is not controverted. In view of the purpose of Congress to equalize as far as possible the pay of Army and Navy officers, manifested by the adoption of the Navy Personnel Act of 1899 and in all subsequent legislation as to such pay, we think it plainly results that the provision relied upon must be held to have been adopted with reference to the settled rule prevailing for so many years, a rule consequent upon the act of 1882. In other words, we think it may not be doubted that the intention of Congress in the provision relied upon was that the longevity pay therein prescribed should be com-

puted according to the methods then prevailing, and which had resulted from the enactment of the statute of 1882.

Judgment reversed and cause remanded, with a direction to enter judgment in favor of claimant for $4,213.86.